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# Conditional Federal Grants: Can the Federal Government Undercut Lobbying by Non-Profits Through Conditional Federal Grants?

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# CONDITIONAL FEDERAL GRANTS: CAN THE GOVERNMENT UNDERCUT LOBBYING BY NONPROFITS THROUGH CONDITIONS PLACED ON FEDERAL GRANTS?

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[1]

To compel a man to furnish funds for the propogation of ideas he disbelieves and abhors is sinful and tyrannical.[2]

## I. INTRODUCTION

Each year the United States government grants billions of dollars in federal funds to a variety of organizations.[3] The authority for this massive spending comes from Article I, § 8 of the Constitution: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . ."[4]

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* Managing Editor, 1996-1997, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

[1] U.S. CONST. amend. I.

[2] 141 CONG. REC. S10,543 (daily ed. July 24, 1995) (position paper of the Heritage Foundation quoting Thomas Jefferson).

[3] 141 CONG. REC. H8389 (daily ed. Aug. 4, 1995) (statement of Rep. Istook). The latest figures available show that in 1990, more than 40,000 organizations received over $39 billion in government grants. *Id.* Whether one characterizes the United States as a "welfare state" or a "mixed economy" is largely a matter of rhetoric. *See* Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1103–04 (1987). The fact of the matter is that the United States government expends an enormous amount of federal funds on a variety of organizations. *See* 141 CONG. REC. H8389 (daily ed. Aug. 4, 1995).

[4] U.S. CONST. art. I, § 8, cl. 1.

Although current popular political views[5] call for severe cutbacks in federal funding, the dependence of states and private organizations on federal funding makes this funding necessary.[6] The reality of this massive federal spending is that many private organizations, especially nonprofit organizations, depend on federal money for their survival.[7] Because of this need, the federal government has recognized that by attaching conditions to the receipt of federal funds, the government can influence the conduct of recipients.[8] Often, the federal government attempts to change or otherwise influence the conduct of the recipients that the government could not otherwise constitutionally regulate.[9]

The federal government is, however, subject to limits on its spending power.[10] The following limits restrict governmental powers inherent in the spending power: (1) the expenditure must promote the public welfare;[11] (2) any conditions imposed through the spending power must not be ambiguous;[12] (3) the conditions must reasonably relate to the purpose of the expenditure;[13] and (4) the legislation

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[5] Jason DeParle, *Rant, Listen, Exploit, Learn, Scare, Help, Manipulate, Lead*, N.Y. TIMES, Jan. 28, 1996, § 6, at 34. House of Representatives Majority Leader Newt Gingrich has led a recent "revolution" aimed at getting government out of the lives of citizens. *Id.* As a part of this political campaign, debates about cutting federal spending have been in the forefront. *Id.* In fact, partisan debates about this very issue led to government shutdowns during the 104th Congress. *Id.*

[6] Rosenthal, *supra* note 3, at 1104. Although many private for-profit organizations depend on federal money and are affected by some of the legislation that this Comment discusses, this Comment focuses on the effect of the legislation on nonprofit organizations. There are approximately 1,400,000 nonprofit organizations in the United States. JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS 14 (1995). In 1990, nonprofits employed 8,700,000 paid employees and had 5,800,000 volunteer employees—10.4% of the work force in the United States. *Id.* Government funds and benefits such as contracts account for 25.8% of the resources of nonprofit organizations. *Id.* at 14–15.

[7] Rosenthal, *supra* note 3, at 1104.

[8] *Id.* at 1125–26.

[9] *Id.* at 1104.

[10] *See* South Dakota v. Dole, 483 U.S. 203, 207–08 (1987); Stephen N. Sher, *The Identical Treatment of Obscene and Indecent Speech: The 1991 NEA Appropriations Act*, 67 CHI.-KENT L. REV. 1107, 1138–39 (1991).

[11] *See* Buckley v. Valeo, 424 U.S. 1, 90–91 (1976). What constitutes the "general welfare" has been broadly interpreted by the courts. *Id.* As the Supreme Court stated in *Buckley*: "Appellants' 'general welfare' contention erroneously treats the General Welfare Clause as a limitation upon congressional power. It is rather a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause." *Id.*

[12] *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

[13] *See* Massachusetts v. United States, 435 U.S. 444, 461 (1978).

cannot violate any constitutional rights of the recipient.[14] This Comment focuses on the fourth limitation to the federal spending power and explores in what situations the government can condition federal spending upon the relinquishment of constitutionally protected First Amendment activity.

In 1995, during its first session, the 104th United States Congress introduced two significant pieces of legislation seeking to restrict the lobbying activities of nonprofit organizations that receive federal funds.[15] The first piece of legislation introduced, the Simpson Amendment, was signed into law by President Clinton as part of the Lobbying Reform Act.[16] The Simpson Amendment forbids all lobbying activities[17] by nonprofit corporations that are organized under § 501(c)(4) of the Internal Revenue Code and that receive federal funds.[18] The second piece of legislation aimed at restricting lobbying

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[14] *See* Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269–70 (1985).

[15] *See* H.R. 2127, 104th Cong., 1st Sess. § 6 (1995) (initial version of Istook Amendment); Lobbying Reform Act, Pub. L. No. 104–65, § 18, 109 Stat. 689, 703–04 (1995). Nonprofit organizations rely on lobbying to bring their message to Congress. *See* Gary Lee, *Environmental Groups Launch Counterattack After Losses on Hill*, WASH. POST, Aug. 19, 1995, at A6. In particular, environmental groups have used lobbying to urge the passage or rejection of certain legislative initiatives. *See id.* Recently, Republicans have geared their agendas towards scaling back environmental laws and regulations. *Id.* The environmental lobby has responded to this anti-environmental agenda by focusing its resources on Capitol Hill. *Id.* Environmental lobbyists have been successful in stopping a bill that would have restricted the ability of the Environmental Protection Agency and other governmental agencies to regulate private industry. *Id.* In addition, environmental lobbyists have been instrumental in stopping Republican-led initiatives to cut back on the protections of the Endangered Species Act. *See* Rocky Barker, *Endangered Species Act Fight Stretches Into Fifth Year*, IDAHO FALLS POST REG., Jan. 3, 1996, at A5. Environmental lobbyists will play a crucial role in the coming year as reform of the Endangered Species Act again takes center-stage. *Id.* The lobbying efforts of environmental groups are particularly important in overcoming the powerful lobbying efforts of big business. *See* Lee, *supra*, at A6. Big business lobbyists have been at the forefront of much of the recent anti-environmental legislation. *See id.* In California, a lobbying effort led by the state Chamber of Commerce, the oil industry, chemical companies, and public water agencies promoted bills aimed at cutting back on sections of the Safe Drinking Water Act. Dan Morain, *Environmental Laws Under Siege*, L.A. TIMES, Sept. 10, 1995, at A3.

[16] *See* Pub. L. No. 104–65, § 18, 109 Stat. 689, 703–04. President Clinton signed the Lobbying Reform Act on December 19, 1995. *Id.*

[17] *See infra* note 192 and accompanying text.

[18] *See* I.R.C. § 501(c)(4) (1995). Nonprofits have the ability to receive tax-exempt status by organizing under any one of 27 provisions in the Internal Revenue Code. *See id.* §§ 501(c)(1)–(23), 501(d)–(f), 521(a). Nonprofits organized under § 501(c)(4) are similar to other nonprofits but are more active in politics because of a lack of restrictions on their lobbying activities. *See Developments in the Law—Nonprofit Corporations*, 105 HARV. L. REV. 1581, 1663 n.45 (1992); *see also* I.R.C. § 501(c)(4); discussion *infra* notes 63–64 and accompanying text.

by recipients of federal funds was the Istook Amendment.[19] The Istook Amendment proposed to cut off federal funds to *all* federal grant recipients,[20] including nonprofit corporations organized under both § 501(c)(3) and § 501(c)(4) of the Internal Revenue Code,[21] that engaged in "political advocacy"[22] above a monetary threshold established by the Amendment.[23] Although the Istook Amendment is not law currently, versions of the Istook Amendment have passed both the House and Senate at different times.[24]

Proponents of the Simpson and Istook Amendments argue that taxpayers should not be required to subsidize the lobbying activities of nonprofit groups whose agendas taxpayers may oppose.[25] Opponents argue that federal funds do not subsidize lobbying by nonprofits because use of federal funds to lobby is already illegal.[26] In addition, opponents argue that the legislation violates the First Amendment right to free speech[27] and is motivated by a desire to "defund the left."[28]

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[19] *See* Andrew Taylor, *Istook Amendment's Wild Ride*, CONG. Q., Nov. 11, 1995, at 3443 (discussing different versions of the Istook Amendment). The Istook Amendment was introduced by Representatives Istook (R-Okla.), McIntosh (R-Ind.) and Ehlrich (R-Md.) but is commonly known as the Istook Amendment. *Id.* There were several versions of the Istook Amendment offered as part of various pieces of legislation during the first session. *See infra* Section III.B and accompanying notes. The first version of the Istook Amendment was offered as part of the appropriations bill for the Departments of Labor and Health and Human Services. *See infra* text accompanying notes 212–17. This Comment will discuss the original language of the Istook Amendment, as well as subsequent compromise language.

[20] Taylor, *supra* note 19, at 3443. Although the Istook Amendment covered all federal grant recipients, this Comment focuses on the effects of the Amendment on nonprofit organizations.

[21] *See* FISHMAN & SCHWARZ, *supra* note 6, at 59. Most nonprofit corporations are organized under § 501(c)(3) and § 501(c)(4). *Id.* This Comment gives a full explanation of the nature of § 501(c)(3) and § 501(c)(4) organizations and the differences between them. *See* discussion *infra* Section II.A.

[22] Taylor, *supra* note 19, at 3443. The activities precluded by the Istook Amendment were characterized as "political advocacy." *Id.* This definition encompassed a broader range of activities than the activities precluded by the Simpson Amendment. *See id.*; *infra* notes 220–24 and accompanying text.

[23] *See infra* notes 218–19 and accompanying text.

[24] *See* Taylor, *supra* note 19, at 3443; *infra* text accompanying note 244 (discussing passage of House of Representatives version of the Istook Amendment); *infra* note 266 (discussing passage of Senate version of the Istook Amendment).

[25] *See, e.g.*, 141 CONG. REC. S10,550 (daily ed. July 24, 1995) (statement of Sen. Kyl on the Simpson Amendment); 141 CONG. REC. H8390 (daily ed. Aug. 4, 1995) (statement of Rep. Hyde on the Istook Amendment).

[26] *See, e.g.*, 141 CONG. REC. S10,557 (daily ed. July 24, 1995) (statement of Sen. Levin).

[27] *See, e.g.*, 141 CONG. REC. H8388 (daily ed. Aug. 4, 1995) (statement of Rep. Skaggs).

[28] *See id.* at H8391 (statement of Rep. Hastings: "This is clearly an attempt by Republicans

Regardless of the political rhetoric, there are serious First Amendment implications to both the Simpson and Istook Amendments. This Comment argues that both pieces of legislation unconstitutionally force § 501(c)(3) and § 501(c)(4) organizations that receive federal funds to choose either to continue receiving federal funds or to waive their constitutional right to free speech.[29]

Section II of this Comment provides an overview of § 501(c)(3) and § 501(c)(4) nonprofit organizations.[30] It outlines the limitations on lobbying by § 501(c)(3) and § 501(c)(4) nonprofit organizations prior to the enactment of the Simpson Amendment.[31] In addition, Section II presents an overview of the United States Supreme Court decisions governing First Amendment issues and the limited ability of Congress to condition governmental benefits on the relinquishment of constitutionally protected activities.[32] Section III provides the legislative histories and an overview of the substantive provisions of both the Simpson and Istook Amendments.[33] Section IV analyzes the constitutionality of both the Simpson and Istook Amendments in light of the case law discussed in Section II.[34] This section argues that the Simpson Amendment unconstitutionally conditions the receipt of federal funds on termination of the recipient organization's lobbying activities, an infringement of First Amendment rights.[35] In addition, Section IV argues that the Istook Amendment, if enacted, would impermissibly condition the receipt of federal funds.[36] The limitations that the Istook Amendment would place on an organization's lobbying activities would be so substantial that the Amendment would effectively preclude organizations from engaging in lobbying.[37]

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to stifl[e] the voice of the liberal-earthy-crunchy-labor-supporting-branola-eating individuals and organizations which devote themselves to making America a better place by utilizing their constitutionally mandated right to influence the political process."); *A Lobbying Rule We Don't Need*, ATLANTA J. & CONST., Aug. 27, 1995, at 4Q.

[29] *See infra* Section IV and accompanying notes.

[30] *See infra* Section II.A and accompanying notes.

[31] *See infra* Section II.A and accompanying notes.

[32] *See infra* Section II.B and accompanying notes.

[33] *See infra* Section III and accompanying notes.

[34] *See infra* Section IV and accompanying notes.

[35] *See id.*

[36] *See id.*

[37] *See id.*

## II. Pre-Amendment Limitations on Lobbying by Nonprofit Organizations

### A. *Section 501(c)(3) and § 501(c)(4) Nonprofit Organizations and Pre-Amendment Limitations on Lobbying Activities*

Although nonprofit corporations organized under § 501(c)(3) and § 501(c)(4) of the Internal Revenue Code both receive tax-exempt status,[38] there are significant differences in the type of work that these organizations do and in the benefits and burdens that their tax status confers upon them.[39] A comparison of the nature of § 501(c)(3) and § 501(c)(4) organizations illuminates these differences.[40]

Commonly called "social welfare" organizations,[41] § 501(c)(4) nonprofit corporations cannot be organized for profit and must be operated exclusively[42] for the promotion of social welfare.[43] Generally, an organization operates exclusively for the promotion of social welfare "if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community. An organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements."[44]

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[38] I.R.C. § 501(a) (1995).

[39] *See Developments in the Law—Nonprofit Corporations*, *supra* note 18, at 1659–65.

[40] I.R.C. § 501(c)(3)–(4). Although there are 25 other code provisions by which nonprofits organize, the analysis in this Comment is restricted to these two provisions. The simple reason for this is that the majority of nonprofit corporations organize under these provisions. *See* Fishman & Schwarz, *supra* note 6, at 59.

[41] *See* Fishman & Schwarz, *supra* note 6, at 556.

[42] Treas. Reg. § 1.501(c)(4)–1(a)(1) (1996). Although § 501(c)(4) requires organizations to be operated "exclusively" for the promotion of social welfare, this is satisfied if the organization is "primarily" engaged in promoting the social welfare. *Id.* § 1.501(c)(4)–1(a)(2).

[43] I.R.C. § 501(c)(4). The tax code defines § 501(c)(4) organizations as:

> Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

*Id.*

[44] Treas. Reg. § 1.501(c)(4)–1(a)(2). As illustrated below, § 501(c)(4) organizations vary in their scope and purpose. *See Developments in the Law—Nonprofit Corporations*, *supra* note 18, at 1663–64. An organization formed to operate an airport serving the general public and located on municipal land was deemed a social welfare organization. *See* Rev. Rul. 78–429, 1987–2 C.B. 178. An anti-abortion group formed to educate the public about the dangers of abortion and to support legislative change to make abortion unconstitutional likewise qualified for § 501(c)(4) status. *See* Rev. Rul. 76–81, 1976–1 C.B. 156–57. In addition, an organization whose primary

Section 501(c)(4) nonprofit corporations are distinguishable from § 501(c)(3) nonprofit corporations, which are commonly called "charitables."[45] Section 501(c)(3) "charitable" organizations cannot be operated for profit, and they must be organized and operated exclusively[46] for charitable activities.[47] The charitable activities of § 501(c)(3) organizations make them more direct-service providing agencies than § 501(c)(4) organizations.[48] Section 501(c)(4) organizations, on the other hand, focus their energies on institutional change, mostly by attempting to shape public opinion and to influence the political process.[49]

There are additional differences between § 501(c)(3) and § 501(c)(4) organizations. Although donors to § 501(c)(3) organizations are al-

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purpose was to prevent oil spills and develop programs for containment and clean-up when the spills occurred qualified for § 501(c)(4) status. *See* Rev. Rul. 79–316, 1979–2 C.B. 228–29.

[45] *See* FISHMAN & SCHWARZ, *supra* note 6, at 310.

[46] *See* Treas. Reg. § 1.501(c)(3)–1(b). The regulations to § 501(c)(3) state that to meet the requirement that the organization be "operated exclusively," the articles of organization of the group: "(a) [Must] [l]imit the purposes of such organization to one or more exempt purposes; and (b) Do not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes." *Id.* § 1.501(c)(3)–1(b)(1)(a)–(b).

[47] I.R.C. § 501(c)(3). The tax code defines "charitable" organizations as:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual. . . .

*Id.*; *see also* FISHMAN & SCHWARZ, *supra* note 6, at 310.

[48] *See* FISHMAN & SCHWARZ, *supra* note 6, at 315 (stating that § 501(c)(3) organizations are classified for their tendency to provide public benefits that "relieve the burdens of government by providing goods or services that society or government is unable or unwilling to provide.").

[49] *See Developments in the Law—Nonprofit Corporations*, *supra* note 18, at 1663–64. Commentators have described the changing role of nonprofits, including § 501(c)(4) nonprofits as follows:

> Increasing numbers of nonprofit organizations have come to believe that the traditional beneficiaries of "charitable" activity are only incompletely served by activities that simply respond to individual problems which are overlooked, or even created by, the laws and public systems devised to address the needs of society's least fortunate. These organizations have turned their efforts to raising public awareness, demanding accountability from governmental agencies, and pressing for changes in the law, all in an attempt to serve the collective interests of those whose needs are ill-served by the status quo.

Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 204 (1988). Well known examples of § 501(c)(4) organizations include the Sierra Club, the Heritage Foundation and the League of Women Voters. *Developments in the Law—Nonprofit Corporations*, *supra* note 18, at 1663–64.

lowed a tax deduction for their contributions,[50] donors to § 501(c)(4) organizations are not allowed this benefit.[51] In addition, there are vast differences between § 501(c)(3) and § 501(c)(4) organizations with respect to restrictions on lobbying activities.[52] The Internal Revenue Code places stringent lobbying restrictions on § 501(c)(3) organizations as a condition of the benefits that they receive in the form of tax-exempt status and the ability of donors to the organizations to deduct contributions.[53] Nonprofit corporations are allowed § 501(c)(3) status only if their lobbying activities fit within the tests imposed by Congress.[54]

There are two ways that § 501(c)(3) organizations may meet the tests imposed by Congress. First, organizations qualify for § 501(c)(3) status if "no substantial part" of their activities is related to lobbying.[55] Unfortunately, sufficient guidelines for the "no substantial part" test have "never been clearly articulated."[56] The test, therefore, creates difficulties for organizations trying to determine to what extent

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[50] *See* I.R.C. § 170(a), (c)(2).

[51] Regan v. Taxation With Representation of Wash., 461 U.S. 540, 543 (1983) (stating that one of the principal differences between § 501(c)(3) and § 501(c)(4) organizations is the inability of donors to § 501(c)(4) organizations to take tax deductions for contributions to organizations). The reason that donors to § 501(c)(4) organizations are not able to deduct contributions is simply that Congress chose not to subsidize § 501(c)(4) organizations to the extent that it did other nonprofit organizations. *Id.* at 544.

[52] I.R.C. § 501(c)(3). Qualification for § 501(c)(3) requires that the organization satisfy the following:

> [N]o substantial part of the activities [of the organization may be] . . . carrying on propaganda, or otherwise attempting, to influence legislation, (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

*Id.*; *Regan*, 461 U.S. at 543 (noting that additional difference between § 501(c)(3) and § 501(c)(4) nonprofit organizations is the freedom of § 501(c)(4) organizations to engage in substantial lobbying).

[53] *See* I.R.C. §§ 170(a), 501(h).

[54] *Id.* § 501(c)(3), (h)(1).

[55] *Id.* § 501(c)(3), (h). Organizations do not qualify under the "no substantial part" test unless: "no substantial part of [their] activities . . . is carrying on propaganda, or otherwise attempting, to influence legislation . . . ." *Id.* § 501(c)(3). An organization engages in "substantial" lobbying when it qualifies as an "action organization." *See* Treas. Reg. § 1.501(c)(3)–1(c)(3). An action organization is an organization that: "(a) Contacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or (b) Advocates the adoption or rejection of legislation." *Id.* § 1.501(c)(3)–1(c)(3)(ii)(a)–(b). Legislation has been defined to include action by Congress, state legislatures, local governing bodies or by the public in a referendum, initiative, constitutional amendment or similar procedure. *Id.* § 1.501(c)(3)–1(c)(3)(ii).

[56] *See* FISHMAN & SCHWARZ, supra note 6, at 502.

they may engage in lobbying activity without risking their § 501(c)(3) status.[57] As a result, many nonprofits elect to use the "expenditure test" embodied in § 501(h) of the Internal Revenue Code to be able to engage assuredly in lobbying activities and maintain their § 501(c)(3) status.[58] The "expenditure test" denies tax-exempt status to organizations that make lobbying or grass roots expenditures[59] in excess of their lobbying[60] or grass roots "ceiling amounts."[61] In addi-

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[57] *Id.* at 504.

[58] *See* I.R.C. § 501(h)(1); FISHMAN & SCHWARZ, supra note 6, at 524–25; *Open Letter to Eligible Charities Regarding the 501(h) Election*, 51 TAX NOTES 655, 655 (May 6, 1991) (reprinting open letter signed by seventeen prominent attorneys and academics recommending § 501(h) election to insure compliance with lobbying limitations within § 501(c)(3)).

[59] *See* I.R.C. § 4911(c)–(d). The Internal Revenue Code defines lobbying expenditures as "expenditures for the purpose of influencing legislation." *Id.* at § 4911(c)(1). The Code further defines influencing legislation as:

> (A) any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof, and (B) any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation.

*Id.* § 4911(d)(1). The term "influencing legislation" does not include:

> (A) making available the results of nonpartisan analysis, study, or research; (B) providing of technical advice or assistance (where such advice would otherwise constitute the influencing of legislation) to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be; (C) appearances before, or communications to, any legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization; (D) communications between the organization and its bona fide members with respect to legislation or proposed legislation of direct interest to the organization and such members, other than communications described in paragraph (3); and (E) any communication with a government official or employee, other than—(i) a communication with a member or employee of a legislative body (where such communication would otherwise constitute the influencing of legislation), or (ii) a communication the principal purpose of which is to influence legislation.

*Id.* § 4911(d)(2)(A)–(E). Grass roots expenditures include all activities that are within the definition of "influencing legislation" with the exception of paragraph (B). *Id.* § 4911(c)(3).

[60] *Id.* § 501(h)(2)(B). The lobbying ceiling amount is 150% of the lobbying nontaxable amount for the year. *Id.* The lobbying nontaxable amount is the lesser of either $1,000,000 or an amount calculated as follows. *Id.* § 4911(c)(2). If the exempt purpose expenditures are not over $500,000, the lobbying nontaxable amount is 20% of the exempt purpose expenditures. *Id.* If the exempt purpose expenditures are over $500,000 but not over $1,000,000, the lobbying nontaxable amount is $100,000 plus 15% of the excess of the exempt purpose expenditures over $500,000. *Id.* If the exempt purpose expenditures are over $1,000,000 but not over $1,500,000, the lobbying nontaxable amount is $175,000 plus 10% of the excess of the exempt purpose expenditures over $1,000.000. *Id.* If the exempt purpose expenditures are over $1,5000,000, the lobbying nontaxable amount is $225,000 plus 5% of the excess of the exempt purpose expenditures over $1,500,000. *Id.*

[61] *Id.* § 501(h)(2)(D). The grass roots ceiling amount is 150% of the grass roots nontaxable

tion, § 501(h) election requires organizations to report lobbying expenditures annually.[62]

In contrast, the Internal Revenue Code imposes no lobbying restrictions on § 501(c)(4) nonprofit organizations.[63] In fact, most § 501(c)(4) organizations engage in significant lobbying activity.[64]

Significantly, the lobbying restrictions in both the Simpson and Istook Amendments, or lack thereof as the case may be, refer only to the use of private funds for lobbying activities by nonprofit organizations.[65] Both § 501(c)(3) and § 501(c)(4) nonprofit organizations are already barred from lobbying with federal funds.[66] Violations of the

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amount for the year. *Id.* The grass roots nontaxable amount is 25% of the lobbying nontaxable amount. *Id.* § 4911(c)(4).

[62] FISHMAN & SCHWARZ, *supra* note 6, at 532. Section 501(h) election requires an organization to file a Form 990 detailing lobbying and grass roots expenditures. *Id.* This requires extensive work for the organization:

> [R]eporting requirements require an electing organization to adopt a relatively sophisticated accounting system, allocating expenditures and general overhead to the direct and grassroots lobbying categories. This is no small chore, particularly because many expenditures may be difficult to categorize. Organizations that lobby should require employees to keep detailed time records so that their salaries and benefits can be properly allocated. Expenses for facilities, publications, and other activities should be apportioned on some reasonable basis. Failure to keep careful records will cause difficulties in the event of an audit.

*Id.*

[63] *See* Regan v. Taxation With Representation of Wash., 461 U.S. 540, 543 (1983).

[64] Treas. Reg. § 1.501(c)(3)–1(c)(3) (1996). The IRS has specifically acknowledged that "action organizations" qualify for § 501(c)(4) status. *Id.*; Treas. Reg. § 1.501(c)(3)–1(c)(3)(iv) (defining "action organizations" as having the following characteristics: "(a) Its main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation; and (b) it advocates, or campaigns for, the attainment of such main or primary objective or objectives as distinguished from engaging in nonpartisan analysis, study, or research and making the results thereof available to the public."); *see also Regan*, 461 U.S. at 543 (stating that § 501(c)(4) organizations are allowed to engage in substantial lobbying activity).

[65] *See* Lobbying Reform Act, Pub. L. No. 104–65, § 18, 109 Stat. 689, 703–04 (1995). Because the language in the Simpson Amendment covers all funds of § 501(c)(4) organizations, the Amendment implicitly includes the private funds of organizations. *See id.* In addition, the language of the Istook Amendment also implicitly includes private funds. *See Ehrlich Proposal Not Worth Harm It Would Do*, BALT. SUN, Dec. 19, 1995, at 16A (noting that the Istook Amendment restricts the use of private funds).

[66] 18 U.S.C. § 1913 (1994). The federal code states:

> No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the

law against the use of federal funds to lobby carry severe fines and possible criminal prosecution.[67] Proponents of both the Simpson and Istook Amendments have been unable to uncover any evidence of abuse by nonprofits.[68] The federal law, therefore, distinguishes between the use of private funds by § 501(c)(3) and § 501(c)(4) organizations and the use of federal funds by these same groups.[69]

### B. *Summary of First Amendment Case Law*

#### 1. Nonprofit Organizations That Receive Federal Funds Retain Fundamental Constitutional Rights

Organizations have no right, per se, to federal funds.[70] The receipt of federal funding by an organization represents only a discretionary privilege or benefit bestowed by the government.[71] There are limits, however, to the government's discretion in awarding these privileges or benefits.[72] In awarding federal funds, some conditions are necessary

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> United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

*Id.*

[67] *Id.* The federal code describes the penalties as follows:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section, shall be fined under this title or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment.

*Id.* Although 18 U.S.C. § 1913 creates government-imposed penalties, the statute does not create a private cause of action for individuals wishing to sue under the statute. *See* National Treasury Employees Union v. Campbell, 654 F.2d 784, 793 (D.C. Cir. 1981) (holding that Congress did not intend to create private cause of action when enacting 18 U.S.C. § 1913). The Istook Amendment, however, creates a private cause of action against organizations violating its commands. *See infra* text accompanying notes 232–33.

[68] *See* Nan Aron, *Q: Should Congress Limit Lobbying by Nonprofit Groups that Receive Federal Grants?; No: The Bill will Silence the Voices of NonProfit Citizen Advocates*, WASH. TIMES, Nov. 27, 1995, at 19 (noting that four hearings held by the House Government and Oversight Subcommittee on Regulatory Affairs failed to unearth evidence of abuse of federal moneys).

[69] *See* 18 U.S.C. § 1913.

[70] *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[71] *See* Regan v. Taxation With Representation of Wash., 461 U.S. 540, 545 (1983) (stating that Congress, in its discretion, may chose which activities to subsidize); *Perry*, 408 U.S. at 597; RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 10.01(2) (1994) (discussing government "privileges").

[72] *See Regan*, 540 U.S. at 545 (stating that "the government may not deny a benefit to a person because he exercises a Constitutional right."); *Perry*, 408 U.S. at 597.

for efficiency in disbursing the federal funds.[73] Analyzing the propriety of the government's discretion in awarding funds requires a determination of whether the conditions assessed for qualification are "classifying" or "coercive."[74]

When the conditions imposed by the government for receiving federal funds are beyond the control of the recipient, this type of condition is "classifying."[75] "Classifying" conditions function to define the categories of eligibility for federal grants.[76] Administrative efficiency demands that in order to be eligible for the receipt of federal funds, it is necessary that the organization or individual meet these "classifying" conditions.[77] "Coercive" conditions, on the other hand, function to influence or discourage activity by the organization or individual receiving the federal funds.[78] While "classifying" conditions are necessary for the orderly administration of the federal grant system, "coercive" conditions are often policy statements that force recipients to comply with the political ideology of the party in office.[79] Determining whether the requirement imposed by the government as a condition of federal funds is either "classifying" or "coercive" is often elusive.[80]

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[73] Rosenthal, *supra* note 3, at 1114.

[74] *See id.*

[75] *See id.* Professor Rosenthal uses the following example. The government has created a statute that provides financial aid for students. *Id.* One condition for the financial aid is that the assets and income of the students not exceed a certain statutorily set limit. *Id.* This is a classifying condition because the assets and income of the student at the time that they apply for the funding are beyond the control of the recipient. *Id.*

[76] *See id.*

[77] *See id.*

[78] *See* Rosenthal, *supra* note 3, at 1114. Professor Rosenthal extends his hypothetical. A coercive condition to the financial aid would be a requirement that any student receiving aid not advocate for nuclear disarmament. *Id.* This requirement would have the coercive effect of discouraging students from protesting nuclear war so that they could receive federal funding for their education. *Id.*

[79] *See id.*; *see also* FCC v. League of Women Voters of Cal., 468 U.S. 364, 384 (1984) (stating that government regulation forbidding editorializing by publicly funded broadcast stations was designed "to limit discussion of controversial topics and thus to shape the agenda for public debate."). Because many organizations rely on federal funds for their survival, "coercive" conditions raise an issue of consent. In the past, "coercive" conditions have been upheld on the theory that if the organizations do not like the condition, they can simply elect not to take the money. *See* Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143–44 (1947); Massachusetts v. Mellon, 262 U.S. 447, 482 (1923).

[80] *See* Rosenthal, *supra* note 3, at 1115–16 n.54. Professor Rosenthal states that the boundaries between coercive and classifying conditions are often difficult to delineate. *Id.* at 1115. For example, a classifying condition that financial aid be given to only male students would be discriminatory although there is no coercive element and the condition is not within the control of the recipient. *Id.* In addition, financial aid that would only be given to students with a certain

Organizations that receive federal funds do, however, retain important constitutional rights, including the First Amendment right to free speech.[81] Generally, the First Amendment protects all types of speech, not just political speech.[82] The First Amendment does not, however, give absolute protection to all speech.[83] Exactly what types of speech will be protected under the First Amendment depends on the content of the speech and the reasons that the speech is being suppressed.[84] Articulating exactly what types of speech will be protected by the First Amendment is difficult given the enormity of circumstances in which First Amendment issues arise.[85] For example, courts have created different tests for First Amendment protections involving prior restraints,[86] speech in schools,[87] commercial speech[88] and labor situations.[89]

The United States Supreme Court explicitly has recognized that lobbying is a constitutionally protected activity under the First Amendment.[90] In *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, the Supreme Court held that there was no violation of the Sherman Act[91] where a group of railroads, a railroad association,

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grade point average would be valid even though it "coerces" students to improve their academic skills. *Id.* Professor Rosenthal argues that although compartmentalizing coercive and classifying conditions is difficult, usually the division between the two can be made by common sense. *See id.* at 1116 n.54.

[81] U.S. CONST. amend. I.; Perry v. Sindermann, 408 U.S. 593, 597 (1972); Speiser v. Randall, 357 U.S. 513, 518 (1958).

[82] *See* NAACP v. Alabama, 357 U.S. 449, 460 (1958) (stating that it is "immaterial whether the beliefs sought to be advanced . . . pertain to political, economic, religious or cultural matters."); Thornhill v. Alabama, 310 U.S. 88, 102 (1940) (stating that "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."); SMOLLA, *supra* note 71, § 2.05(3).

[83] *See* Frohwerk v. United States, 249 U.S. 204, 206 (1919) (stating that the First Amendment does not give absolute protection to all possible uses of speech).

[84] *See* SMOLLA, *supra* note 71, § 3.01(2)(a)–(b). For example, the standard of review of First Amendment activity varies depending on whether the regulation imposed is content-neutral or content-based. *Id.* Content-based regulation is subject to strict scrutiny by the courts while content-neutral regulation is subject to a more intermediate level of scrutiny. *Id.*

[85] *Id.* § 3.03(2), at 84 (discussing the difficulty of describing modern First Amendment jurisprudence).

[86] *Id.* § 8.

[87] *Id.* § 10.04.

[88] *Id.* § 12.

[89] SMOLLA, *supra* note 71, § 12.06.

[90] *See* Regan v. Taxation With Representation of Wash., 461 U.S. 540, 552 (1983) (Blackmun, J., concurring); Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 137–38 (1961).

[91] *See Eastern R.R.*, 365 U.S. at 135–36. Generally, the Sherman Act forbids trade restraints and monopolies. *Id.*

and a public relations firm petitioned the government for laws relating to trucking weight limits and higher tax rates for heavy trucking.[92] The Supreme Court based its reasoning, in part, on the fact that the "right to petition [the government] is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."[93]

### 2. The *Speiser-Perry* Model

The Supreme Court specifically has recognized that the government cannot condition benefits on restrictions of constitutionally protected First Amendment activity.[94] In *Speiser v. Randall*, California enacted a state constitutional provision that required honorably discharged veterans of World War II who claimed a veterans property tax-exemption to sign an oath of loyalty to the United States government and the State of California.[95] The Supreme Court found that conditioning receipt of a tax-exemption upon this oath of loyalty was an unconstitutional limitation on free speech.[96] Denial of the tax-exemption to those who refused the oath would have the effect of coercing recipients into refraining from speaking out against the government.[97] The Court rejected the idea that because a tax-exemption is a discretionary "privilege" or "bounty," limitation on this "privilege" cannot be a First Amendment violation.[98] Implicitly emphasizing the retention of constitutional rights that beneficiaries of federal benefits receive, the Court reasoned that legislative bodies cannot do through their spending power what they cannot constitutionally do outside of this power.[99] Thus, because Congress could not abridge First Amendment rights by making laws, neither could it do so by placing restrictions on the money it allocated.[100]

Subsequently, the United States Supreme Court in *Perry v. Sindermann* also held that the government could not attach conditions to the receipt of benefits that it could not impose constitutionally through its rule making powers.[101] The respondent in *Perry* argued

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[92] *See id.* at 129.
[93] *Id.* at 138.
[94] *See* Speiser v. Randall, 357 U.S. 513, 518–19 (1958).
[95] *Id.* at 514–15.
[96] *Id.* at 519.
[97] *Id.*
[98] *Id.* at 518.
[99] *See Speiser*, 357 U.S. at 518.
[100] *See id.*
[101] *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972).

that he had been denied the benefit of renewal of his teaching position at a state junior college because he had become active in an organization critical of the college administration.[102] The Supreme Court found that if the respondent was denied the governmental benefit of a contract to teach at a state college because of First Amendment activity, this denial was unconstitutional because it "penalized and inhibited" free speech.[103] The Court again emphasized that recipients of federal benefits retain constitutional rights.[104] Like the *Speiser v. Randall* Court, the *Perry* Court specifically stated that the government cannot condition the receipt of federal benefits upon the relinquishment of constitutionally protected activities.[105] According to the Court: "[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech. . . . [T]his would allow the government to 'produce a result which [it] could not command directly.'"[106]

The Court's focus in both *Speiser* and *Perry* was to preclude the government from regulating activities through its spending power that it could not constitutionally regulate if there were no federal funds involved.[107] The United States Supreme Court expressed this same theme in *FCC v. League of Women Voters of California.*[108] In this case, the Supreme Court addressed the constitutionality of a federal statute similar in content to the Istook and Simpson Amendments.[109] The Public Broadcasting Act of 1967[110] created the Corporation for Public Broadcasting, a nonprofit corporation that disbursed federal funds to noncommercial radio and television stations.[111] A provision in the Act prohibited any television or radio station receiving these federal funds from editorializing.[112] The Court found that the

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[102] *Id.* at 594–95.

[103] *Id.* at 597–98. The lower court had granted summary judgment against the respondent on the theory that because respondent had no contract with the college at the time of his termination and because the college did not have a tenure system, he had no cause of action against the college. *Id.* at 595–96. The Court of Appeals for the Fifth Circuit and Supreme Court, therefore, had no information on which to conclude whether or not respondent had been denied a new contract because of his First Amendment activities. *Id.* at 596, 598.

[104] *See id.* at 597.

[105] *Id.*

[106] *Perry*, 408 U.S. at 597 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

[107] *See id.* at 597; *Speiser*, 357 U.S. 513, 518.

[108] *See* 468 U.S. 364, 385 n.16 (1984).

[109] *See id.* at 370 n.7; *infra* Sections III.A–B.

[110] *See* 47 U.S.C. §§ 390–99 (1994).

[111] *See League of Women Voters*, 468 U.S. at 366.

[112] *Id.* at 370 n.7. Section 399 of the Public Broadcasting Act of 1967 read: "No noncommercial

precluded activity, editorializing, deserved special First Amendment protections and stated that:

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.[113]

Because of the special nature of the First Amendment activity, the Court balanced the governmental interests in restricting the activity and whether the statute was narrowly tailored to meet these needs against the infringement on First Amendment activity.[114]

The Court specifically rejected the interests advanced by the government,[115] finding that the statute instead was intended to prevent the use of taxpayer moneys in activities that taxpayers may not support.[116] The Court found that:

> [V]irtually every congressional appropriation will to some extent involve a use of public money as to which some taxpayers may object. Nevertheless, this does not mean that those taxpayers have a constitutionally protected right to enjoin such expenditures. Nor can this interest be invoked to justify a congressional decision to suppress speech.[117]

In addition, the Court found that the statute was not tailored narrowly because it encompassed many types of speech that did not address specifically the governmental interest asserted.[118] Because

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educational broadcasting station which receives a grant from the Corporation under subpart C of this part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office." *Id.* Although the statute restricted political campaign activity, the Court did not address this issue. *Id.* at 371.

[113] *Id.* at 381–82 (quoting Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940)).

[114] *Id.* at 383.

[115] *Id.* at 385–86. The Court noted that the governmental interests implicated were the ability to:

> [P]rotect noncommercial educational broadcasting stations from being coerced, as a result of federal financing, into becoming vehicles for the Government propagandizing or the objects of governmental influence; and, second, to keep these stations from becoming convenient targets for capture by private interest groups wishing to express their own partisan viewpoints.

*Id.* at 384–85.

[116] *League of Women Voters*, 468 U.S. at 385 n.16.

[117] *Id.* (citation omitted).

[118] *Id.* at 392–93.

the Court found that the only governmental interest implicated was prevention of the use of federal funds for activities that taxpayers may or may not agree with, and because the statute was not narrowly tailored, the Court held the statute unconstitutional.[119] The Court was again asserting that the government could not regulate through its spending power what it could not constitutionally regulate independent of its spending power.[120]

3. The "Subsidy" Cases

Although the Supreme Court has found that the government cannot condition the receipt of federal funds upon the waiver or relinquishment of constitutional rights,[121] some restrictions imposed by the government as a condition of governmental benefits have been upheld.[122] In *Cammarano v. United States*, the Supreme Court held that regulations promulgated by the Internal Revenue Service denying tax deductions for expenditures made for lobbying efforts did not present a First Amendment question.[123] The petitioners were not denied a tax deduction because they engaged in constitutionally protected speech.[124] Instead, the denial of the deduction amounted only to a requirement that the petitioners pay for their lobbying activities out of their own pocket.[125] The Court emphasized that Congress had simply made a discretionary decision that because "purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned."[126]

Justice Douglas, in his concurrence, indicated that the result would have been different if *all* "ordinary and necessary" business deductions were denied to anyone who engaged in lobbying and not just those deductions that represented lobbying activities.[127] The above scenario, Justice Douglas found, would place a penalty on certain

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[119] *Id.* at 384–85, 392–93.

[120] *See id.* at 385–86 n.16.

[121] *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972); Speiser v. Randall, 357 U.S. 513, 518 (1958).

[122] *See, e.g.*, Regan v. Taxation With Representation of Wash., 461 U.S. 540, 545–46 (1983); Cammarano v. United States, 358 U.S. 498, 512–13 (1959).

[123] *See Cammarano*, 358 U.S. at 512–13.

[124] *Id.* at 513.

[125] *Id.*

[126] *Id.*

[127] *See id.* at 515 (Douglas, J., concurring).

forms of speech, putting the case into the *Speiser* model whereby the government was regulating activity that it could not otherwise constitutionally regulate.[128]

Following *Cammarano*, the Supreme Court decided *Regan v. Taxation With Representation of Washington.*[129] In *Regan*, the Court analyzed the constitutionality of the prohibition of "substantial lobbying" by nonprofits organized under § 501(c)(3) of the Internal Revenue Code.[130] The Court held that the prohibition on "substantial lobbying" in the tax code did not violate the First Amendment.[131] Taxation With Representation of Washington (TWR), a nonprofit organized to lobby Congress, the executive branch, and the judiciary, sought tax-exempt status under § 501(c)(3).[132] The Internal Revenue Service denied § 501(c)(3) status to TWR because "a substantial part of [petitioner's] activities would consist of attempting to influence legislation . . . ."[133] TWR claimed that the denial of § 501(c)(3) status because of its lobbying activities was an unconstitutional violation of its First Amendment rights because it placed an "unconstitutional condition"[134] on its ability to receive tax deductible contributions.[135] The Court, however, held that the prohibition against lobbying in the tax code was not a First Amendment violation.[136] By excluding organizations that engaged in substantial lobbying from § 501(c)(3) status, Congress, in its discretion, had chosen not to subsidize lobbying as much as it subsidized other activities of nonprofits.[137] Central to this

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[128] *Cammarano*, 358 U.S. at 513 (Douglas, J. concurring); *see also* Speiser v. Randall, 357 U.S. 513, 518 (1958).

[129] *See* 461 U.S. 540, 540 (1983).

[130] *Id.* at 542.

[131] *Id.* at 546.

[132] *Id.* at 541–42.

[133] *Id.* at 542.

[134] *Regan*, 540 U.S. at 545. The Court's mention of unconstitutional conditions sweeps the doctrine of unconstitutional conditions into the opinion. *See id.* The doctrine asserts that even though the government has discretion in awarding federal funds, it cannot then force the recipient of these funds to waive a constitutional right. *See* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5, 7 (1988). While the doctrine and the significant treatment that it receives from commentators is helpful in analyzing conditional federal grants, it is also elusive: "Like the police power, it is a creature of judicial implication. It roams about constitutional law like Banquo's ghost, invoked in some cases, but not in others." *Id.* at 10–11.

[135] *Regan*, 540 U.S. at 545. TWR's lobbying activities placed the organization in the § 501(c)(4) tax-exempt category, thereby disallowing tax deductions for charitable contributions made by donors. *See id.*

[136] *Id.* at 546.

[137] *Id.* at 544. Section 501(c)(3) organizations have a double subsidy from the government

holding was that denying § 501(c)(3) status to TWR did not preclude it from lobbying entirely.[138] Although TWR could not obtain § 501(c)(3) status, it could qualify as a § 501(c)(4) nonprofit organization which would allow it to lobby without restriction.[139] The Court specifically noted the option of a dual structure.[140] Under this structure, TWR would not be precluded from lobbying by its ability to operate a § 501(c)(3) organization for non-lobbying activities and a § 501(c)(4) organization to engage in lobbying.[141]

In a concurring opinion, Justice Blackmun reiterated the importance of the dual system for First Amendment purposes: "Any significant restriction on [the dual structure] would negate the saving effect of § 501(c)(4) . . . . Should the IRS attempt to limit the control these organizations exercise over the lobbying of their § 501(c)(4) affiliates, the First Amendment problems would be insurmountable. . . ."[142] Justice Blackmun voiced his additional concerns that through subsequent legislation § 501(c)(4) organizations would be precluded from lobbying on behalf of their § 501(c)(3) affiliates.[143] Voicing his opposition to any such legislation, Justice Blackmun stated that this would effectively:

> [P]erpetuate § 501(c)(3) organizations' inability to make known their views on legislation without incurring the unconstitutional penalty. Such restrictions would extend far beyond Congress's mere refusal to subsidize lobbying. In my view, any such restriction would render the statutory scheme unconstitutional.[144]

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through receipt of tax-exempt status and the charitable donation deduction. I.R.C. §§ 170(a), 501(c)(3) (1995). Section 501(c)(4) organizations are not subsidized as heavily since donors do not receive charitable donation deductions. *Regan*, 540 U.S. at 543. The Court in *Regan* stated that it rejected the "'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" *Id.* at 546 (quoting Cammarano v. United States, 358 U.S. 498, 515 (1959)).

[138] *Regan*, 540 U.S. at 544.

[139] *Id.* Note, however, that donors to TWR would not be able to deduct contributions. *Id.* at 543. This is addressed by the Court when it states that "Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare." *Id.* at 544.

[140] *Id.*

[141] *Id.*

[142] *Id.* at 553–54 (Blackmun, J., concurring); *see also* FCC v. League of Women Voters of Cal., 468 U.S. 364, 400 (1984) (stating that *Regan* holding—that conditioning § 501(c)(3) status on the extent of lobbying activities was not unconstitutional—relied on the ability of § 501(c)(3)'s to organize a § 501(c)(4) lobbying arm).

[143] *See Regan*, 461 U.S. at 553–54 (Blackmun, J., concurring).

[144] *Id.*

The Court in *Regan* specifically noted that the case did not fall within the *Speiser-Perry* model because the tax code did not deny TWR the right to receive deductible contributions because of the exercise of free speech through its lobbying activities.[145] The Court found instead that the case fit squarely within the subsidy model by which Congress had simply chosen to exercise discretion in its subsidies to groups such as TWR.[146] The Court found, however, that if the statutory scheme placed a condition on the receipt of tax-exempt status that denied TWR a benefit independent of its tax-exempt status and as a result of its lobbying activity, it would be unconstitutional.[147] In this case, Congress would be imposing a condition that was not related to the benefit being bestowed and was therefore outside of the scope of Congress's discretion.[148]

The Court extended the "subsidy" line of cases in *Rust v. Sullivan*.[149] The petitioners in *Rust* claimed that regulations promulgated under § 1008 of the Public Health Service Act[150] were unconstitutional because they required the recipient of federal funds under Title X[151] for family-planning services to relinquish a constitutional right.[152] Petitioners claimed that the regulations violated their First Amendment rights to "engage in abortion advocacy and counseling."[153] The Court disagreed, however, holding that the Government was not denying a subsidy or benefit because of the exercise of a constitutional right,[154] but was only requiring that the federal funds be used for what they were designated: "'to support preventive family planning services,

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[145] *See id.* at 545–46.

[146] *Id.* at 546.

[147] *See id.* at 545.

[148] *See Regan*, 461 U.S. at 545.

[149] 500 U.S. 173, 173 (1991).

[150] *Id.* at 179–81. The regulations attached three conditions to the receipt of federal money under § 1008 of the Public Health Service Act. *Id.* at 179. First, recipients cannot provide counseling that includes advocating abortion as a method of family planning and cannot refer clients for outside counseling related to this method. *Id.* at 179–80. Secondly, recipients cannot engage in activities independent of counseling that encourage the use of abortion for family planning. *Id.* at 180. Specifically forbidden are lobbying for legislation increasing the availability of abortions and using legal action to make abortions more available as a method of family planning. *Id.* Lastly, the regulations require that recipients of federal funds be organized such that they are "physically and financially separate" from any abortion-related services. *Id.* at 180–81.

[151] *Id.* at 178. Title X provides federal funding for "family-planning services." *Id.*

[152] *Id.* at 181.

[153] *Id.* at 196.

[154] *Rust*, 500 U.S. at 196.

population research, infertility services, and other related medical, informational, and educational activities.'"[155] Important to the Court's finding was that the regulations only governed the scope of the activities for which the federal funds were granted.[156] The Court found:

> The regulations govern the scope of the Title X *project's* activities, and leave the grantee unfettered in its other activities. The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.[157]

The Court contrasted its holding that the government can place conditions on activities for which federal funds were designated with the line of "unconstitutional conditions" cases.[158] The Court distinguished its holding in *Rust* by pointing out that in the unconstitutional conditions cases, "the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the *recipient* from engaging in the protected conduct outside the scope of the federally funded program."[159] The Court found that the Title X regulations fell outside of the fact patterns in the unconstitutional conditions cases, because the regulations govern only the particular program for which the federal funds were designated and not the conduct outside of this activity.[160]

In the "subsidy" line of cases, the Supreme Court has held that some restrictions imposed by the government as a condition of the receipt of benefits will be allowed.[161] The Court has held, however, that conditions placed on the receipt of benefits which preclude the recipient from engaging in constitutionally protected activity beyond the scope of the activity for which the funds are designated are unconstitutional.[162]

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[155] *Id.* at 178 (quoting H.R. CONF. REP. No. 1667, 91st Cong., 1st Sess. 8 (1970)).

[156] *Id.* at 196.

[157] *Id.*

[158] *Id.* at 197.

[159] *Rust*, 500 U.S. at 197 (emphasis added).

[160] *Id.* at 196–97.

[161] *Id.*; Regan v. Taxation With Representation of Wash., 461 U.S. 540, 546 (1983); Cammarano v. United States, 358 U.S. 498, 512–13 (1959).

[162] *Rust*, 500 U.S. at 196.

4. The Distinction Between the Use of Private and Public Funds

A common thread running through the coercive spending conditions cases is the notation by the Supreme Court of whether the organization is able, after receipt of conditional funds, to use its private funds to engage in the prohibited or restricted activities.[163] In *FCC v. League of Women Voters of California*, the Court was troubled that a statute not only barred organizations receiving federal funds from engaging in editorializing with these funds, but it barred this activity even with private funds.[164] The inability of broadcast stations to segregate their activities according to federal and private funding rendered the statute unconstitutional.[165] Without segregation, stations would be precluded from making their views known at all, a violation of their First Amendment rights.[166]

The Court noted, however, that if the statute allowed organizations to create privately funded affiliates and allowed them to editorialize, this would be constitutional.[167] The Court's reasoning followed that of *Regan v. Taxation With Representation of Washington*.[168] In *Regan*, the Court noted that the use of a dual structure would allow the petitioner to segregate its lobbying activity into a tax code category that would allow it unlimited lobbying activity.[169] Similarly, the Court in *League of Women Voters* noted that if the statute allowed the use of a dual structure, the Court would most likely find it constitutional under the *Regan* Court's reasoning.[170] The Court found that: "public broadcasting stations would be free . . . to make known [their] views on matters of public importance through [their] nonfederally funded, editorializing affiliate[s] without losing federal grants for [their] noneditorializing broadcast activities."[171]

Both the majority opinion and Justice Blackmun's concurrence in *Regan v. Taxation With Representation of Washington* noted the dichotomy between the use of private and public funds.[172] The major-

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[163] *E.g., id.* at 197–98; FCC v. League of Women Voters of Cal., 468 U.S. 364, 400 (1984).

[164] *League of Women Voters*, 468 U.S. at 400.

[165] *Id.* at 400–01. To illustrate the effect of the regulations on the private funds of organizations, the Court used the following example. A noncommercial educational station that received only 1% of its budget from federal grants would be barred from editorializing because of its inability to segregate federal funds from private funds in operating the station. *Id.* at 400.

[166] *Id.*

[167] *Id.*

[168] *Id.*; *see* Regan v. Taxation With Representation of Wash., 461 U.S. 540, 544 (1983).

[169] *Regan*, 461 U.S. at 544.

[170] *League of Women Voters*, 468 U.S. at 400–01.

[171] *Id.* at 400.

[172] *See Regan*, 461 U.S. at 545, 553.

ity framed the issue in the case not as whether TWR must be permitted to lobby with private funds even though it also receives a government subsidy, but rather whether it must be allowed to use tax deductible contributions to subsidize its lobbying activity.[173] By framing the issue this way, the Court implicitly recognized that if TWR were precluded through the tax code from using its private funds to lobby, the outcome of the case may very well have been different.[174] In addition, the concurring opinion of Justice Blackmun also noted the difference between governmental conditions on the use of private funds as opposed to governmental conditions on the use of public funds.[175] In his concurrence, Blackmun noted that, although the current tax code structure is not unconstitutional because it allows nonprofit organizations to lobby unrestricted by setting up a § 501(c)(4) affiliate, any restriction on the ability to do so would render the scheme unconstitutional.[176]

In *Rust v. Sullivan*, the Court held that the government could condition the receipt of federal funds upon a ban on abortion-related activity as long as grantees could engage in abortion-related activities in a separate capacity.[177] This segregation requirement did not violate the grantee's First Amendment right to free speech, but rather ensured that federal funds were furthering governmental policies.[178]

In *Federal Election Commission v. Massachusetts Citizens for Life*, the Supreme Court analyzed the constitutionality of § 316 of the Federal Election Campaign Act.[179] Section 316 prohibited corporations from making expenditures "in connection with" federal campaigns from general treasury funds, requiring that any contributions made be done through the use of a separate segregated fund.[180] Formation of the segregated fund, however, constituted a "political committee" under the Federal Election Campaign Act and was therefore subject to extensive regulation.[181] The Court found that the require-

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[173] *See id.* at 543–44.

[174] *See id.* at 545 (stating that: "The Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activities, nor does it deny TWR any independent benefit on account of its intention to lobby.").

[175] *See id.* at 553 (Blackmun, J., concurring).

[176] *Id.* at 553–54.

[177] Rust v. Sullivan, 500 U.S. 173, 197–98 (1991).

[178] *Id.* at 198.

[179] *See* Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 238 (1986).

[180] *Id.* at 241.

[181] *See id.* at 253–54. The Court noted that the formation of a "political committee" required the corporation to appoint a treasurer who was required to maintain extensive records and to follow strict and burdensome filing requirements concerning the organization and financial status of the corporation. *See id.*

ment of a segregated fund and the accompanying requirements rendered the statute unconstitutional.[182] The Court stated:

> [W]hile [the statute] does not remove all opportunities for independent spending by organizations . . . the avenue it leaves open is more burdensome than the one it forecloses. The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [the statute] as an infringement on First Amendment activities.[183]

The Court specifically distinguished its own opinion in *Regan*.[184] The Court found that:

> *Regan* . . . involved the requirement that a nonprofit corporation establish a separate lobbying entity if contributions to the corporation for the conduct of other activities were to be tax deductible. If the corporation chose not to set up such a lobbying arm, it would not be eligible for tax-deductible contributions. Such a result, however, would infringe no protected activity, for there is no right to have speech subsidized by the Government. . . . [T]he activity that may be discouraged in this case, independent spending, is core political speech under the First Amendment.[185]

## III. The History of the Simpson and Istook Amendments

### A. *The Simpson Amendment*

On July 21, 1995, members of the United States Congress in favor of reforming the lobbying registration and disclosure laws placed the Lobbying Reform Act on the Senate calendar.[186] Generally, the Act added stricter registration and disclosure requirements to already existing lobbying laws.[187] The Senate aimed to restore public

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[182] *Id.* at 254–55.

[183] *Id.* at 255. The Court specifically noted that the requirements of the statute would effect smaller organizations to a greater extent:

> [S]uch duties require a far more complex and formalized organization than many small groups could manage . . . . Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports . . . it would not be surprising if at least some of the groups decided that the contemplated political activity was simply not worth it.

*Id.* at 254–55.

[184] *Citizens For Life*, 479 U.S. at 256 n.9.

[185] *Id.* (citation omitted).

[186] 141 Cong. Rec. S10,490 (daily ed. July 21, 1995). The Lobbying Reform Act was Senate Bill 1060. *Id.*

[187] *See* S. 1060, 104th Cong., 1st Sess. §§ 4–7 (1995).

confidence in government institutions and officials by tightening lobbying regulations.[188]

On July 24, 1995, Amendment No. 1839[189] (Simpson Amendment) was submitted to the pending Lobbying Reform Act.[190] The Simpson Amendment provided that: "[a]n organization described in section 501(c)(4) of the Internal Revenue Code of 1996 which engages in lobbying activities shall not be eligible for the receipt of Federal funds constituting an award, grant, contract, loan or any other form."[191] The goal of the Simpson Amendment was to force § 501(c)(4) nonprofit organizations either to give up any federal funding they receive or to reorganize as a § 501(c)(3) corporation, which by law would severely limit their lobbying activities.[192] Senator Simpson and his supporters targeted § 501(c)(4) nonprofit corporations because of the benefits that § 501(c)(4) organizations receive by virtue of their tax code status and because of the political nature of the work of § 501(c)(4) organizations.[193]

Because there were no lobbying restrictions on the use of private funds by § 501(c)(4) organizations prior to the Simpson Amendment,

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[188] *See id.* § 2; 141 CONG. REC. S10,538–39 (daily ed. July 24, 1995) (statement of Sen. Glenn).

[189] *See* 141 CONG. REC. S10,539 (daily ed. July 24, 1995). Simpson Amendment No. 1839 was technically modified by Craig Amendment No. 1842. *Id.* at S10,546. The substance of the Simpson Amendment, however, remained unchanged by the Craig Amendment. *Id.* The quoted language is in technically corrected form.

[190] *Id.* The amendment was submitted by Senator Alan K. Simpson, a Republican from Wyoming. *Id.*

[191] *Id.*

[192] *See supra* Section II.A; 141 CONG. REC. S10,546 (daily ed. July 24, 1995) (statement of Sen. Craig). Lobbying activities, as defined in the Lobbying Reform Act include:

> [L]obbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.

S. 1060, 104th Cong., 1st Sess. § 3(7) (1995). The Act further defines "lobbying contacts" as including:

> [A]ny oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to—(I) the formulation, modification, or adoption of federal legislation (including legislative proposals); (II) the formulation, modification, or adoption of a federal rule, regulation, executive order, or any other program, policy, or position of the United States Government; (III) the administration or execution of a federal program or policy (including the negotiation, award, or administration of a federal contract, grant, loan, permit, or license); or (IV) the nomination or confirmation of a person for a position subject to confirmation by the Senate.

*Id.* § 3(8)(A).

[193] *See* I.R.C. § 501(a), (c)(4) (1995); *Developments in the Law—Nonprofit Corporations*, *supra* note 18, at 1663–64 (characterizing § 501(c)(4) organizations as "politically active").

Senator Simpson and his supporters believed that providing federal funds to organizations that engage in lobbying amounts to lobbying "subsidies" for nonprofits.[194] Proponents of the Simpson Amendment focused on the fungibility of federal grants.[195] For example, suppose that a nonprofit received $100,000 in federal funds in fiscal year 1995 and also received hundreds of thousands in private funds. If, in that same year, the nonprofit spent $100,000 on lobbying, how can anyone be certain that the $100,000 federal grant was not spent on lobbying?[196] Proponents also argued that the fungibility of federal grants increased an organization's ability to lobby.[197] For example, when a nonprofit receives a $100,000 federal grant, it then has a $100,000 surplus in its treasury due to the influx of federal funds. Prior to enactment of the Simpson Amendment, these treasury funds had no restrictions on them and could be used for unlimited lobbying.[198] Finally, proponents argued that the fungibility of federal funds creates an appearance that the nonprofit is a larger player in the political arena than it really is, thereby overestimating its popular support.[199]

Those opposing the Simpson Amendment labeled the Amendment redundant in light of the existing ban on the use of federal funds to lobby.[200] Opponents argued that if the driving force behind the Simpson Amendment was concern that § 501(c)(4) nonprofit organizations were using federal funds to lobby, investigation and penalties under the federal law prohibiting lobbying would adequately address these concerns.[201] In addition, opponents expressed concern that the real motivation behind the Simpson Amendment was not to reform practices amongst the 140,000 § 501(c)(4) organizations that accept federal

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[194] *See* 141 CONG. REC. S10,550 (daily ed. July 24, 1995) (statement of Sen. Kyl: "No American should be taxed to advance the political agenda of an organization that he or she may have no wish to support or one that advocates an agenda that he strongly opposes. Subsidies for political advocacy are wrong.").

[195] *See id.* at S10,543 (position paper of the Heritage Foundation).

[196] *See id.*

[197] *Id.* at S10,549 (statement of Sen. Kyl: "once a Federal grant reaches the organizations' bank account, it simply frees up additional dollars for the groups to spend on lobbying activities. Many of the organizations are on Capitol Hill every day, often lobbying for more taxpayer money on one program or another. Congress has not only been filling the trough, but paying these groups to feed there.").

[198] *See* I.R.C. § 501(c)(4) (1995); *supra* notes 63–64 and accompanying text.

[199] 141 CONG. REC. S10,543 (daily ed. July 24, 1995) (position paper of the Heritage Foundation).

[200] *See* 18 U.S.C. § 1913 (1994); 141 CONG. REC. S10,557 (daily ed. July 24, 1995) (statement of Sen. Levin).

[201] 141 CONG. REC. S10,556–57 (daily ed. July 24, 1995) (statement of Sen. Dodd).

money. Instead, opponents believed that the driving force behind the Amendment was to silence the small number of organizations whose policies are in conflict with the policies of the Republican-led Congress.[202] Finally, opponents expressed concern that the Simpson Amendment infringes on the First Amendment rights of § 501(c)(4) nonprofits by preventing the use of private funds to express ideas and to petition the government.[203]

Opposition to the Simpson Amendment dwindled when opponents found a loophole in the application of the Amendment. Nothing in the language of the Amendment precludes splitting already existing § 501(c)(4) organizations into two § 501(c)(4) organizations—one operating solely on privately raised funds and responsible for lobbying activity, and one operating on both federal and private funding.[204] The result of splitting the nonprofit into two organizations would be to allow unlimited lobbying activity in the organization that did not contain any federal funds.[205]

On the same day that Senator Simpson proposed the Simpson Amendment, the House passed the Amendment.[206] Subsequently, the House passed the Lobbying Reform Act, with the Simpson Amendment attached, sending the entire bill to the House of Representatives for approval.[207] After some delay, the House of Repre-

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[202] *Id.* at S10,556 (statement of Senator Dodd: "it seems to me that we are taking . . . a rather draconian step . . . out of the 140,000 we are talking a handful that really stick in the craw of my colleague from Wyoming [a Republican Senator]."). Out of the 140,000 § 501(c)(4) corporations accepting federal funds, a study introduced by proponents of the Amendment focused on only fifty-six organizations. *See id.* at S10,547. In addition, a position paper by the Heritage Foundation read during the Senate debate studied only ten organizations including the Environmental Defense Fund and the World Wildlife Fund. *Id.* at S10,545–46.

[203] *See id.* at S10,555 (statement of Sen. Dodd).

[204] *Id.* (statement of Senator Simpson: "if a 501(c)(4) decided that they wanted to continue to lobby and were receiving Federal funds, they could no longer continue to lobby. However, if they wished to continue to receive Federal funds, then they would limit their lobbying activities. They can also go into splits, if they wish to split a 501(c)(4) organization. At least that would be an improvement over present law, which simply says that these groups can lobby.")

[205] *See id.*

[206] 141 CONG. REC. S10,559 (daily ed. July 24, 1995). The vote on the Simpson Amendment was 59 in favor and 37 in opposition. *Id.* Fifty-two Republicans and seven Democrats voted in favor of the Amendment while no Republicans and 37 Democrats voted to reject the Amendment. *Id.*

[207] Jonathan D. Salant, *Senate Passes Tighter Rules on Registration, Disclosure*, CONG. Q., July 29, 1995, at 2239. The Lobbying Reform Act passed the Senate by a vote of 98 in favor, with no members in opposition. *Id.* The reason for the unanimous passage of the Lobbying Reform Act was most likely due to Congress's perception that voting in opposition to a bill that set limits for lobbying activities would result in negative public reaction.

sentatives passed the Lobbying Reform Act.[208] Subsequently, President Clinton signed the Lobbying Reform Act into law.[209]

Within days of the Lobbying Reform Act and the Simpson Amendment becoming law, members of the House of Representatives filed legislation to repeal the Simpson Amendment from the Lobbying Reform Act.[210] Currently, the repealing legislation sits in the House Judiciary Committee.[211]

### B. *The Istook Amendment*

#### 1. Version I of the Istook Amendment

The Istook Amendment, in its first version,[212] proposed to restrict "political advocacy"[213] by all organizations that receive federal funds.[214] Like the Simpson Amendment, restrictions in the Istook Amendment affect § 501(c)(4) nonprofit organizations.[215] Unlike the Simpson Amendment, however, the Istook Amendment also affects § 501(c)(3) nonprofit organizations, already heavily restricted by the Internal Revenue Code.[216] Because of its sweeping nature, the Istook Amendment garnered much more attention than the Simpson Amendment, both on the House floor and in the media.[217]

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[208] 141 CONG. REC. H13,744–45 (daily ed. Nov. 29, 1995); Jonathan D. Salant, *Bill Would Open Windows on Lobbying Efforts*, CONG. Q., Dec. 2, 1995, at 3631. The House of Representatives passed the Senate's version of the Lobbying Reform Act in lieu of H.R. 2564, the Lobbying Reform Act initially offered for approval to the House. Salant, *supra*.

[209] Lobbying Reform Act, Pub. L. No. 104–65, § 18, 109 Stat. 689, 689 (1995).

[210] 141 CONG. REC. H14,963 (daily ed. Dec. 15, 1995). Representative Skaggs, a Democrat from Colorado, filed H.R. 2785 on December 15, 1995. *Id.*

[211] *Id.*

[212] H.R. 2127, 104th Cong., 1st Sess. §§ 601–606 (1995); Jonathan D. Salant & Robert Marshall Wells, *AARP's Federal Funds Endangered*, CONG. Q., July 29, 1995, at 2240. The first version of the Istook Amendment appeared as Title VI of the Labor and Health and Human Services appropriations bill in the House of Representatives. Salant & Wells, *supra*.

[213] *See* H.R. 2127, § 601(c)(1). The Istook Amendment restricts "political advocacy," a broad interpretation of lobbying activities. *Id.* Exactly what activities are classified as "political advocacy" will be discussed later in this Comment. *See infra* notes 220–23 and accompanying text.

[214] H.R. 2127, § 601(a).

[215] *See id.*

[216] *See id.*; *supra* notes 55–61 and accompanying text for a discussion of restrictions on § 501(c)(3) organizations. The Istook Amendment affects all federal grant recipients, regardless of their tax code status. *See* H.R. 2127, § 601(a). This Comment, however, concentrates on the effects of the Amendment on the two most common tax-exempt categories, § 501(c)(3) and § 501(c)(4) organizations.

[217] *See, e.g.*, *Muzzling the Nonprofits*, N.Y. TIMES, Nov. 2, 1995, at A26; Elliot Richardson & Tom Joe, *Reject that Gag Rule*, WASH. POST, Aug. 29, 1995, at A19; *A Lobbying Rule We Don't*

As attached to the Labor-Health and Human Services Appropriations Bill, the Istook Amendment cut off federal funds to all nonprofit organizations, including § 501(c)(3) and § 501(c)(4) organizations that engaged in lobbying over the "political advocacy threshold."[218] As defined in the bill, the "political advocacy threshold" would have cut off federal funds to any grant recipient that either spent more than: (1) five percent of the first $20 million of its budget over the previous five fiscal years on political advocacy; or (2) one percent of its budget over $20 million for political advocacy in the current fiscal year.[219]

"Political advocacy" encompasses a much broader range of activities than "lobbying activities," the pivotal term in the Simpson Amendment.[220] As defined in the Istook Amendment, "political advocacy" included all activities designed to influence legislation and political campaigns.[221] In addition, the definition extended to litigation, including *amicus* work, and agency proceedings where federal, state,

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*Need, supra* note 28, at 4Q. At different points during the first session of the 104th Congress the Istook Amendment was the subject of many articles and editorials in most of the major newspapers in the United States. *See, e.g., Muzzling the Nonprofits, supra*; Richardson & Joe, *supra*; *A Lobbying Rule We Don't Need, supra* note 28, at 4Q.

[218] H.R. 2127, § 601(a)(1)–(3). H.R. 2127 read in relevant part:

> [T]he following limitations apply to any grant which is made from funds appropriated . . . (1) No grantee may use funds from any grant to engage in political advocacy. (2) No grant applicant may receive any grant if its expenditures for political advocacy for any one of the previous five Federal fiscal years exceeded its prohibited political advocacy threshold . . . (3) During any one Federal fiscal year in which a grantee has possession, custody or control of grant funds, the grantee shall not use any funds . . . to engage in political advocacy in excess of its prohibited political advocacy threshold for the prior Federal fiscal year.

*Id.*

[219] *Id.* § 601(a)(2). The formula for determining the "political advocacy threshold" of an organization is determined by calculating the difference between the grant applicant's total expenditures made in a given Federal fiscal year and the total grants it received in that Federal fiscal year, multiplying the first $20,000,000 of the difference by .05 and multiplying the remainder of the difference calculated by .01. The sum of these two figures is the "political advocacy threshold." *See id.* § 601(a)(2)(A)–(D). In addition to meeting the requirements of the "political advocacy threshold," recipients of federal funds would also be required to comply with either the "no substantial part" test of § 501(c)(3) or the § 501(h) election. *See supra* notes 55–61 and accompanying text.

[220] *See supra* note 192.

[221] H.R. 2127, § 601(c)(1)(A)–(B). H.R. 2127 defined "political advocacy" to include:

> (A) carrying on propaganda, or otherwise attempting to influence legislation or agency action, including, but not limited to monetary or in-kind contributions, endorsements, publicity, or similar activity; (B) participating or intervening in (including the publishing or distribution of statements) any political campaign on behalf of (or in opposition to) any candidate for public office, including but not limited to monetary or in-kind contributions, endorsements, publicity, or similar activity. . . .

*Id.*

or local governments were parties.[222] Finally, "political advocacy" included giving money or in-kind support to any organization whose own expenditures for political advocacy exceeded fifteen percent of its total expenditures for that federal fiscal year.[223] This definition precludes a broader range of activities than those precluded by the Internal Revenue Code.[224]

The Istook Amendment also placed restrictions on the types of organizations with which nonprofit federal grant recipients could do business.[225] Under the Amendment, recipients of federal money would not be able to conduct business with any other organization or person that had spent more than fifteen percent of its budget in the previous fiscal year on political advocacy.[226] This provision would prevent or-

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[222] *Id.* § 601(c)(1)(C). The definition of "political advocacy" also included:

> [P]articipating in any judicial litigation or agency proceeding (including as an *amicus curiae*) in which agents or instrumentalities of Federal, State, or local governments are parties, other than litigation in which the grantee or grant applicant: is a defendant appearing in its own behalf; is defending its tax-exempt status; or is challenging a government decision or action directed specifically at the powers, rights, or duties of that grantee or grant applicant. . . .

*Id.*

[223] *Id.* § 601(c)(1)(D).

[224] *See supra* notes 55–61 and accompanying text. The definition of political advocacy specifically excluded the following activities:

> (i) making available the results of nonpartisan analysis, study, research, or debate; (ii) providing technical advice or assistance (where such advice would otherwise constitute the influencing of legislation or agency action) to a governmental body or to a committee or other subdivision thereof in response to a request by such body or subdivision, as the case may be; (iii) communications between the grantee and its bona fide members with respect to legislation, proposed legislation, agency action, or proposed agency action of direct interest to the grantee and such members, other than communications described in subparagraph (C); (iv) any communication with a governmental official or employee, other than—(I) a communication with a member or employee of a legislative body or agency (where such communication would otherwise constitute the influencing of legislation or agency action); or (II) a communication the principal purpose of which is to influence legislation or agency action and; (v) official communications by employees of State or local governments, or by organizations whose membership consists exclusively of State or local governments; (C) Communications with Members—(i) A communication between a grantee and any bona fide member of such organization to directly encourage such member to communicate as provided in paragraph (2)(A)(ii) shall be treated as a paragraph (2)(A)(ii) communication by the grantee itself. (ii) A communication between a grantee and any bona fide member of such organization to directly encourage such member to urge persons other than members to communicate as provided in either clause (i) or (ii) paragraph (2)(A) shall be treated as a communication described in paragraph (2)(A)(i).

H.R. 2127, § 601(c)(1)(D).

[225] H.R. 2127, § 601(a)(4).

[226] *Id.* The Istook Amendment stated:

> No grantee may use funds from any grant to purchase or secure any goods or services (including dues and membership fees) from any other individual, entity, or organization

ganizations that utilize a dual structure from doing business with the lobbying arm of the organization.[227]

The Istook Amendment also contained strict provisions to enforce the requirements laid out in the Amendment.[228] Under the Amendment, every grantee of federal funds would have been subject to random auditing and would have had the burden of proving to the government by clear and convincing evidence the grantee's compliance with the Act.[229] In addition, there were strict disclosure requirements for recipients.[230] Each year, every grantee would have had to file an annual report stating either that it did not engage in political advocacy or setting forth a detailed description of the political advocacy in which it was engaged.[231]

Finally, the Istook Amendment created a statutory cause of action against any federal grant recipient found to be in violation of the Amendment.[232] This requirement would subject recipients of federal funds to lawsuits by both the government and by zealous individuals who would be entitled to bring civil actions against the recipient.[233] In

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whose expenditures for political advocacy for the previous Federal fiscal year exceeded 15 percent of its total expenditures for that Federal fiscal year.

*Id.*

[227] *See id.*; *supra* notes 140–42 and accompanying text (discussing use of dual system).

[228] H.R. 2127, § 601(b)(1).

[229] *Id.* § 601(b)(1). The Istook Amendment provided that:

(1) Each grantee shall be subject to audit from time to time as follows: (A) Audits may be requested and conducted by the General Accounting Office or other auditing entity authorized by Congress, including the inspector general of the Federal entity awarding or administering the grant . . . (C) A grantee that engages in political advocacy shall have the burden of proving, by clear and convincing evidence, that it is in compliance with the limitations of this section.

*Id.*

[230] *Id.* § 602(a).

[231] *Id.* The required information would have been:

(A) the grant identification number; (B) the amount or value of the grant (including all administrative and overhead costs awarded); (C) a brief description of the purpose or purposes for which the grant was awarded; (D) the identity of each Federal, state and local government entity awarding or administering the grant, and program thereunder; (E) the name and grantee identification number of each individual, entity, or organization to whom the grantee made a grant; (F) a brief description of the grantee's political advocacy, and a good faith estimate of the grantee's expenditures on political advocacy; (G) a good faith estimate of the grantee's prohibited political advocacy threshold.

*Id.* § 602(a)(2)(A)–(G).

[232] *Id.* § 601(b)(2). The Istook Amendment allowed for the federal grant at issue to be "recovered in the same manner and to the same extent as a false or fraudulent claim for payment or approval made to the Federal Government pursuant to sections 3729 through 3812 of title 31, United States Code." *Id.*; 31 U.S.C. §§ 3729–3812 (1994).

[233] *See* 31 U.S.C. § 3730(b)(1). Allowing individuals to sue federal grant recipients for non-compliance with the Istook Amendment would most likely create a "bounty-like" atmosphere

addition, employees of the federal government who knowingly or negligently granted funds to organizations not in compliance with the Amendment would have been subject to disciplinary action and civil penalties.[234]

The same day that the House of Representative was to vote on the Labor-Health and Human Services Appropriations Bill with the Istook Amendment attached, an amendment to strip the Istook Amendment from the Bill was introduced.[235] Debate in the House on this Amendment, the Skaggs Amendment, was heated.[236] Like opponents of the Simpson Amendment, opponents of the Istook Amendment attacked the Amendment as an unconstitutional violation of the First Amendment rights of all organizations receiving federal funds.[237] Again, opponents questioned the larger political motivations of the Republicans who had initiated the Istook Amendment.[238]

Opponents raised additional arguments not raised during the debate on the Simpson Amendment. First, opponents repeatedly questioned the selectiveness of the Istook Amendment.[239] Opponents questioned why the Istook Amendment targeted nonprofit organizations

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whereby groups opposing the political viewpoints of grant recipients would harass the recipients through litigation. Aron, *supra* note 68, at 19.

[234] H.R. 2127, § 601(b)(3). The Istook Amendment stated:

> Any officer or employee of the Federal Government who awards or administers funds from any grant to a grantee who is not in compliance with this section shall—(A) for knowing or negligent noncompliance with this section, be subjected to appropriate administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office; and (B) for knowing noncompliance with this section, pay a civil penalty of not more than $5,000 for each improper disbursement of funds.

*Id.*

[235] 141 CONG. REC. H8388 (daily ed. Aug. 3, 1995). Representative Skaggs introduced House Amendment No. 64 on August 3, 1995. *Id.*

[236] *See generally id.* at H8388–97.

[237] *Id.* at H8390. Representative Collins of Illinois read a statement from David Cole, a constitutional law professor at Georgetown University Law Center:

> The Istook bill is constitutionally flawed in numerous respects, most fundamentally because it restricts the rights of all federal grantees to use their own money to engage in core First Amendment protected activities, including public debate on issues of public concern, communication with elected representatives, and litigation against the government.

*Id.*

[238] *Id.* at H8392 (statement of Rep. Sabo: "This legislation tells American workers and students, the children and the elderly, the middle class and the disadvantaged to absorb painful budget cuts so that the very wealthiest can prosper further still. This objective is at the core of the Republicans' fiscal agenda."). *Id.*

[239] *Id.* at H8939.

but the Appropriations Committee rejected a proposed revision that would have imposed the Amendment's prohibitions on contractors[240] receiving federal contracts and loans.[241] Opponents also questioned why the Amendment targeted organizations with small budgets.[242] Notwithstanding these valid concerns, the House rejected the Amendment that would have stripped the Istook language from the Labor-Health and Human Services Appropriations Bill.[243] Subsequently, the House passed the Labor-Health and Human Services Appropriations Bill with the Istook Amendment intact.[244]

In the Senate, opposition to the Istook Amendment was fierce.[245] By the time the Labor-Health and Human Services Appropriations Bill was reported to the Senate, the Istook language had been stripped off by the Senate Labor-Health and Human Services Subcommittee.[246]

### 2. Version II of the Istook Amendment

Version II of the Istook Amendment had substantial differences from Version I.[247] First, Version II of the Istook Amendment capped

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[240] *See* I.R.C. § 162(e) (1995). Corporate taxpayers are prevented from deducting costs associated with lobbying. *Id.*

[241] 141 CONG. REC. H8393 (daily ed. Aug. 4, 1995) (statement of Rep. Sabo). Representative Sabo said on the House floor: "A very select group of organizations would be impacted by these prohibitions. In an unjustifiable break with current laws, the political activities of Federal grantees alone are singled out while Federal contractors are left alone." *Id.*; *see also id.* at H8395 (statement of Rep. Obey: "Their amendment does not apply to corporate lobbyists who can do full page ads telling us every day to spend $50, $60, $70 billion of taxpayers' money on airplanes we do not need while we are trying to starve our own folks. We should be ashamed of ourselves. This amendment is an absolute joke and it is a disgrace to the Congress.").

[242] *Id.* at H8393 (statement of Rep. Sabo). For example, an organization with a budget of $100,000,000 would be allowed to spend $1 million on political advocacy. *Id.* But an organization with a $100,000 budget would only be allowed to spend $5,000 on political advocacy. *Id.*

[243] *Id.* at H8396–97. The Amendment was rejected by a vote of 187 in favor and 232 in opposition. *Id.*

[244] *Id.* at H8419–21. The vote on the Bill was 219 in favor with 208 in opposition. Two hundred and fourteen Republicans and five Democrats voted for the Bill, while 18 Republicans and 189 Democrats voted against it. *Id.*

[245] Andrew Taylor, *Treasury-Postal Conferees Fail to Resolve Lobbying Issue*, CONG. Q., Oct. 28, 1995, at 3299 (reporting that the Istook Amendment was not expected to get past Senator Arlen Specter, the Senate Labor and Health and Human Services Subcommittee Chairman).

[246] Robert Marshall Wells, *Panel Votes to Soften Cuts in Labor-HHS Spending*, CONG. Q., Sept. 16, 1995, at 2812.

[247] *See supra* Section III.B.1. Version II of the Istook Amendment was initially introduced as part of H.R. 2020, the Treasury-Postal Appropriations Bill. Taylor, *supra* note 245, at 3299. Initially, an Amendment substantially similar to the Simpson Amendment—Amendment 2237—was successfully attached by Senator Simpson to the Treasury-Postal Bill. 141 CONG. REC.

"political advocacy" expenses at $100,000 for organizations with budgets, more than one-third of which was derived from federal grants.[248] In addition, this version of the Istook Amendment exempted organizations that spent less than $25,000 per year on political advocacy.[249] Supporters of the Amendment claimed this safe harbor exempted over ninety-six percent of nonprofit organizations from the effects of the Istook Amendment.[250] In addition, the formula from the original Istook Amendment[251] was changed to a sliding scale that allowed recipients of federal funds to spend twenty percent of the first $500,000 of their budget on political advocacy, with the permitted percentage descending as the amount of an organization's budget rose.[252] Regardless of the permitted percentages, the revised Istook Amendment placed a hard cap of $1 million on the political advocacy expenditures by all federal grant recipients.[253] Ultimately, Senate conferees rejected Version II of the Istook Amendment in favor of Amendment 2237, a version of the Simpson Amendment which had been successfully attached to the Treasury-Postal Bill.[254] Nevertheless, debate on Version II of the Istook Amendment held up passage of the Treasury-Postal Appropriations Bill for ten weeks.[255] The ability of proponents of the Istook Amendment to frustrate the budget processes of the United States reflects the firm commitment of these proponents to pass the Istook Amendment.

### 3. Version III of the Istook Amendment

Proponents of the Istook Amendment again succeeded in attaching the Amendment to the stopgap budget bill, House Joint Resolution 115.[256] The language in Version III of the Istook Amendment was

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S11,630–31 (daily ed. Aug. 5, 1995). Specifically, Amendment 2237 would have cut off federal grants to § 501(c)(4) organizations with budgets of $10,000,000 or more and which engaged in lobbying activities. *See id.*; Taylor, *supra* note 245, at 3299. Proponents of the Istook Amendment seized the opportunity to substitute Version II of the Istook Amendment for Amendment 2237 in committee. Taylor, *supra* note 245, at 3299.

[248] Taylor, *supra* note 245, at 3299.

[249] *Id.*

[250] *Id.*

[251] *Supra* note 219 and accompanying text.

[252] Taylor, *supra* note 245, at 3299.

[253] *Id.*

[254] *Id.* In conference, the $10,000,000 budget limit in the Simpson Amendment was lowered to $3,000,000. *Id.*

[255] Tamar Lewin, *Liberal Urging Has Given Way to Eerie Hush*, N.Y. TIMES, Nov. 24, 1995, at A1.

[256] H.R.J. Res. 115, 104th Cong., 1st Sess. (1995); Taylor, *supra* note 19, at 3443. Once attached,

similar to Version II.[257] All organizations were ineligible for federal funds if in the previous federal fiscal year the organization received more than one-third of its revenues from federal grants and expended more than a certain amount on "lobbying activities,"[258] the lesser of either $100,000 or a calculation based on the difference between total expenditures made by the organization and grants received by the organization.[259] All § 501(c)(4) organizations, except for those with

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opponents attempted to bounce the Istook Amendment off of the budget bill before a full vote on the budget was held. Taylor, *supra* note 19, at 3443. Proponents of the Istook Amendment succeeded, however, in passing a rule making provision that precluded any amendments to the budget bill, thereby assuring that the Istook Amendment would remain on the budget bill until the vote. *Id.* The provision was introduced via House Resolution 257. H.R. Res. 257, 104th Cong., 1st Sess. (1995). The resolution read:

> That immediately upon the adoption of this resolution the House shall without intervention of any point of order consider in the House the joint resolution (H.J. Res. 115) making further continuing appropriations for the fiscal year 1996, and for other purposes. The previous question shall be considered as ordered on the joint resolution and any amendment thereto to final passage without intervening motion except (1) one hour of debate on the joint resolution, which shall be equally divided and controlled by the chairman and ranking minority member of the Committee on Appropriations; and (2) one motion to recommit, which may include instructions only if offered by the minority leader or his designee.

*Id.* The vote on the resolution was 216 in favor and 210 in opposition. 141 CONG. REC. H11,890–91 (daily ed. Nov. 8, 1995). House Joint Resolution 115, with the Istook Amendment intact, subsequently passed the House of Representatives on November 8, 1995. *Id.* at H11,904–05.

[257] *See* H.R.J. Res. 115; *supra* Section III.B.2.

[258] H.R.J. Res. 115, § 301(a)(6). Lobbying activities were defined as anything included in the definition of political advocacy with the exception of activities "relating to any judicial litigation or agency proceeding . . . ." *Id.* § 301(d)(6). The Resolution defined political advocacy in terms substantially similar to Version I of the Istook Amendment. *See id.*; *supra* notes 220–23 and accompanying text. The exceptions to the definition of political advocacy were also substantially similar to Version I of the Istook Amendment. *See* H.R.J. Res. 115; *supra* note 224 and accompanying text. Version III of the Istook Amendment added the following exception:

> [P]articipating in a particular activity that is specifically and explicitly directed and sanctioned by an Act of Congress, and is specifically and explicitly approved in the contract or other agreement under which the taxpayer subsidized grant is made, except that such exception shall not apply to any such contract or other agreement that is first entered into after the date of the enactment of this Act, is renewed after such date, or is terminable or amendable after such date at the option of the government entity awarding or administering such grant, unless such activity is specifically and explicitly directed and sanctioned by an Act of Congress after January 1, 1995.

H.R.J. Res. 115, § 301(d)(4)(B)(vi).

[259] H.R.J. Res. 115, § 301(a)(7)(B). The formula for the calculation was as follows:

> (i) Calculate the difference between the taxpayer subsidized grant applicant's total expenditures made in a given Federal fiscal year and the total taxpayer subsidized grants it received in that Federal fiscal year. (ii) For the first $500,000 of the amount calculated under clause (i), multiply by 0.20. (iii) For the portion of the amount calculated under clause (i) that is more than $500,000 but not more than $1,000,000, multiply by 0.15. (iv) For the portion of the amount calculated under clause (i) that is more than $1,000,000, but not more than $1,500,000, multiply by 0.10. (v) For the portion of the

gross annual revenues of less than $3,000,000, would have been barred from receiving federal funds if they also engaged in lobbying activities.[260] In addition, the Amendment barred all federal grant recipients, other than § 501(c)(4) organizations,[261] from receiving federal funds if their expenditures for political advocacy exceeded the lesser of $1,000,000 or a calculation, again based on the difference between the organization's total expenditures and total grants received.[262] It further barred organizations that received federal funds from purchasing or securing goods or services from other organizations with political advocacy expenditures in the previous federal fiscal year of either: (1) $25,000 or (2) fifteen percent of the organization's total expenditures for the previous federal fiscal year.[263] Federal grant recipients who spent less than $25,000 on political advocacy in the previous Federal fiscal year were exempt from the requirements of this version of the Istook Amendment.[264] Again, proponents claimed that this exempted ninety-six percent of federal grant recipients.[265] This version of the Istook Amendment subsequently passed the House.[266]

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amount calculated under clause (i) that is more than $1,500,000, but not more than $17,000,000, multiply by 0.05. (vi) calculate the sum of the products described in clauses (ii) through (v).

*Id.*

[260] *Id.* § 301(a)(5). This portion of Version III of the Istook Amendment used the term "lobbying activities" rather than the term political advocacy, used throughout the rest of the Bill. *Id.* As defined in the Resolution, "lobbying activities" included all activities encompassed within the definition of "political advocacy" other than "advocacy relating to any judicial litigation or agency proceeding . . . ." *Id.* § 301(d)(6).

[261] *Id.* § 301(a)(5).

[262] *Id.* § 301(a)(7). The calculation in the Resolution was the same used to calculate political advocacy and lobbying expenditures in the Resolution. *Id.* § 301(a)(7)(B).

[263] *Id.* § 301(a)(9).

[264] H.R.J. Res. 115, § 301(a)(10). Version II of the Istook Amendment contained the same provision. *See supra* notes 249–50 and accompanying text.

[265] 141 CONG. REC. H11,885 (daily ed. Nov. 8, 1995) (statement of Rep. Istook). Representative Istook claimed on the House floor:

> [W]e have an exemption in this bill that exempts 96 percent of the charities in this country from any limitation. That is the provision which states that only if they expend more than $25,000 in political advocacy do they come within any of these percentage limitations whatsoever. Ninety-six percent of the 501(c)(3)'s in the United States, according to their submissions to the IRS, do not spend that much. It is a much smaller number that has been abusive, and we are trying to target that abuse.

*Id.*

[266] *Id.* at H11,904–05. The Senate substituted a diluted Amendment in place of the Istook Amendment that the House had passed. 141 CONG. REC. S16,925–26 (daily ed. Nov. 9, 1995). Senator Alan K. Simpson substituted Amendment No. 3048 for the Istook Amendment. *Id.* The substitute Amendment barred all § 501(c)(4) organizations with budgets of more than $3,000,000 from receiving federal funds if they engaged in "lobbying activities." *Id.* "Lobbying activities,"

as defined in this version included all "lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for the use in contacts, and coordination with the lobbying activities of others." 141 CONG. REC. H11,904–05 (daily ed. Nov. 8, 1995). Lobbying contacts specifically included:

> [A]ny oral or written communications (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to—(i) the formulation, modification, or adoption of Federal legislation (including legislative proposals); (ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government; (iii) the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or (iv) the nomination or confirmation of a person for a position subject to confirmation by the Senate.

*Id.* The definition of lobbying contacts did not include communications which were:

> (i) made by a public official acting in the public official's capacity; (ii) made by the representative of a media organization if the purpose of the communication is gathering and disseminating news and information to the public; (iii) made in a speech, article, publication or other material that is distributed and made available to the public, or through radio, television, cable television, or other medium of mass communication; (iv) made on behalf of a government of a foreign country or a foreign political party and disclosed under the Foreign Agents Registration Act of 1938 (22 U.S.C. § 611 et seq.); (v) a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered executive branch official or a covered legislative branch official; (vi) made in the course of participation in an advisory committee subject to the Federal Advisory Committee Act; (vii) testimony given before a committee, subcommittee, or task force of the Congress, or submitted for inclusion in the public record of a hearing conducted by such committee, subcommittee, or task force; (viii) information provided in writing in response to an oral or written request by a covered executive branch official or a covered legislative branch official for specific information; (ix) required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of the Congress or an agency; (x) made in response to a notice in the Federal Register, Commerce Business Daily, or other similar publication soliciting communications from the public and directed to the agency official specifically designated in the notice to receive such communications; (xi) not possible to report without disclosing information, the unauthorized disclosure of which is prohibited by law; (xii) made to an official in an agency with regard to—(I) a judicial proceeding or a criminal or civil law enforcement inquiry, investigation, or proceeding; or (II) a filing or proceeding that the Government is specifically required by statute or regulation to maintain or conduct on a confidential basis, if that agency is charged with responsibility for such proceeding, inquiry, investigation, or filing; (xiii) made in compliance with written agency procedures regarding an adjudication conducted by the agency under section 554 of title 5, United States Code, or substantially similar provisions; (xiv) a written comment filed in the course of a public proceeding or any other communication that is made on the record in a public proceeding; (xv) a petition for agency action made in writing and required to be a matter of public record pursuant to established agency procedures; (xvi) made on behalf of an individual with regard to that individual's benefits, employment, or other personal matters involving only that individual, except that this clause does not apply to any communication with—(I) a covered executive branch official, or (II) a covered legislative branch official (other than the individual's elected Members of Congress or employees who work under such Members' direct supervision), with

## IV. ANALYSIS

### A. *The Simpson Amendment and the Proposed Istook Amendment: Unconstitutional under the* Speiser-Perry *Model*

Because lobbying is a constitutionally protected First Amendment activity,[267] both the Simpson Amendment and the proposed Istook Amendment condition[268] federal funding on the relinquishment of a

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respect to the formulation, modification, or adoption of private legislation for the relief of that individual . . . .

*Id.* In addition, all federal grant recipients receiving more than $125,000 in federal funds were subject to the limits in I.R.C. § 4911(c)(2)(B) on their lobbying activity expenditures. *Id.* The reference to the limitations in § 4911(c)(2)(B) was a technical error. There is no such code provision. What the Amendment most likely meant to refer to were the limitations in § 4911(a) which impose a tax equal to twenty-five percent of the amount of any "lobbying expenditures" in excess of the "lobbying nontaxable amount." *See* I.R.C. § 4911(a)(1) (1995). Lobbying expenditures are defined as any expenditures for the purpose of influencing legislation. *See id.* § 4911(c)(1). The code further defines activities that influence legislation as:

(A) any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof, and (B) any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation.

*Id.* § 4911(d)(1). The definition of "influencing legislation" does not include:

(A) making available the results of nonpartisan analysis, study, or research; (B) providing of technical advice or assistance (where such advice would otherwise constitute the influencing of legislation) to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be; (C) appearances before, or communications to, any legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization; (D) communications between the organization and its bona fide members with respect to legislation or proposed legislation of direct interest to the organization and such members, other than communications described in paragraph (3); and (E) any communication with a governmental official or employee, other than—(i) a communication with a member or employee of a legislative body (where such communication would otherwise constitute the influencing of legislation), or (ii) a communication the principal purpose of which is to influence legislation.

*Id.* § 4911(d)(2). Those receiving less than $125,000 were exempt from the requirements of the substitute Amendment. 141 CONG. REC. S16,925–26 (daily ed. Nov. 9, 1995). In addition, organizations with budgets of $17,000,000 or more were allowed to spend an additional one percent of their funds on lobbying activities. *Id.* The Senate passed this substitute Amendment. This version of the Istook Amendment was passed on November 9, 1995 by a vote of 49 in favor and 47 in opposition. *Id.* at S16,891. President Clinton subsequently vetoed the measure. Since the attempt to enact the Istook Amendment through the stopgap spending bill, supporters of the Istook Amendment have been unable to find an appropriate legislative vehicle.

[267] *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 137–38 (1961).

[268] The condition that recipients of federal funds not engage in lobbying activities as a condi-

constitutional right.[269] As such, analysis of the constitutionality of these Amendments[270] falls under the *Speiser-Perry* model which stands for the proposition that the government cannot condition the receipt of federal benefits upon the relinquishment of constitutionally protected activities.[271]

Like the oath of loyalty that the State of California attempted to have veterans sign in exchange for a property tax-exemption in *Speiser*,[272] both the Simpson and Istook Amendments require nonprofits to end all lobbying efforts[273] or lose their federal moneys.[274] Moreover, like the teacher in *Perry*, whose benefit of a teaching position was possibly revoked for speaking out against his college's administration, under the Simpson and Istook Amendments, § 501(c)(3) and § 501(c)(4) nonprofit organizations that continue to lobby will lose their federal moneys for participating in constitutionally protected activities.[275] The concern of the Court in both *Perry* and

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tion of receiving federal funds is a coercive condition. *See* Rosenthal, *supra* note 3, at 1114; *supra* notes 78–79 and accompanying text. The condition is not merely classifying because it does not only function to define the categories of federal grant recipients. *See* Rosenthal, *supra* note 3, at 1114; *supra* notes 75–77 and accompanying text. It is coercive because it functions to influence the decision by the organization whether to engage in lobbying. *See* Rosenthal, *supra* note 3, at 1114; *supra* note 178 and accompanying text. An organization may well decide that rather than lose federal funding, it will forego lobbying activities. Some case law suggests that conditions such as these are not coercive because the organization can elect not to take the funding. *Supra* note 79. This theory, however, is dated given the financial dependance of many organizations on federal funds. The effect of "coercive" conditions given this dependence is that organizations may elect to forego conduct conditioned upon the federal funds, even though it is constitutionally protected, rather than risk the loss of the funds altogether.

[269] Perry v. Sindermann, 408 U.S. 593, 597–98 (1972); Speiser v. Randall, 357 U.S. 513, 513 (1958).

[270] Although analysis of the Istook Amendment is futuristic as we have no ability to determine whether this legislation will ever pass, analysis is important for pointing out the potential power of Congress to impose unconstitutional conditions on organizations that can affect the content and extent of debate in government.

[271] *See Perry*, 408 U.S. at 597; *Speiser*, 357 U.S. at 518.

[272] 357 U.S. at 514–15.

[273] It is true that the proposed Istook Amendment does not preclude all lobbying by organizations receiving federal funds as the Simpson Amendment does. *See supra* notes 218–19 and accompanying text. The restrictions contained in the Istook Amendment, along with already existing limitations in the tax code, so significantly limit the ability of organizations to lobby that they dilute, if they do not effectively silence, the message that these organizations want their lobbying activities to convey. *See id.*; *supra* notes 55–61 and accompanying text. This is exactly the type of free speech limitation that the First Amendment prohibits. *Supra* notes 81–91 and accompanying text.

[274] *See supra* notes 192–93 and accompanying text (discussing the Simpson Amendment); *supra* notes 218–19 (discussing the Istook Amendment).

[275] *See Perry*, 408 U.S. at 594–95, 597–98.

*Speiser* was that the condition imposed would have the effect of coercing the recipients of federal funds to refrain from engaging in constitutionally protected activities.[276] This concern is implicated by both the Simpson and Istook Amendments.

Organizations that fall under the restrictions in the Simpson and Istook Amendments are forced to make new choices about their status. Under the Simpson Amendment, organizations can give up federal funding and continue to lobby the government; they can keep their federal funds and reorganize under § 501(c)(3), subject to the substantial restrictions on their lobbying activities;[277] or they can maintain their § 501(c)(4) status and federal funds but discontinue their lobbying activities. By reorganizing under § 501(c)(3), although organizations are not coerced into discontinuing their lobbying activities entirely, their lobbying activities are effectively curtailed under the limitations imposed by the tax code.[278] The coercive effect of the Simpson Amendment is most dramatically revealed by the last option. If an organization wishes to maintain its § 501(c)(4) status and federal funding, the Simpson Amendment coerces the recipient into refraining from First Amendment activity.[279] Following the Court's reasoning in *Perry* and *Speiser*, the Simpson Amendment unconstitutionally conditions the receipt of federal funds on free speech limitations.[280]

If Congress passes the Istook Amendment, nonprofit corporations organized under § 501(c)(3)[281] that both receive federal funds and lobby the government would be subject to the substantial lobbying limitations inherent in their § 501(c)(3) status and the additional lobbying restrictions that the Istook Amendment would place on them.[282] Section 501(c)(3) organizations that wished to reorganize into a § 501(c)(4) organization in order to avoid these limitations on lobbying would be foreclosed from doing so by the Simpson Amendment.[283] The significant concern of both the *Perry* and *Speiser* Courts—that the condition imposed would have the effect of coercing the recipients of

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[276] *See id.* at 594–95; *Speiser*, 357 U.S. at 519.

[277] *See supra* notes 55–61.

[278] *See supra* note 268.

[279] *See supra* note 192 and accompanying text.

[280] *Perry*, 408 U.S. at 597–98; *Speiser*, 357 U.S. at 519.

[281] Section 501(c)(4) organizations that accepted federal funds would not be subject to the limitations in the Istook Amendment as they would already be precluded from engaging in lobbying by the Simpson Amendment. *See supra* Section III.A.

[282] *See supra* notes 55–61 and accompanying text (discussing tax code limitations); *supra* notes 218–23 (discussing limitations in the Istook Amendment).

[283] *See supra* Section III.A.

federal funds from engaging in constitutionally protected activities—is clearly realized with the Istook Amendment.[284]

It is true that by allowing § 501(c)(3) and § 501(c)(4) organizations to maintain tax-exempt status and by availing them federal funds, the government has granted a subsidy to these organizations.[285] The fact that a subsidy has been granted, however, does not mean that the condition imposed is incapable of violating the First Amendment.[286] Recipients of federal subsidies retain fundamental constitutional rights.[287] Congress could not have required all § 501(c)(3) and § 501(c)(4) organizations to end their lobbying activities independently of the federal grants bestowed on these organizations. Thus, Congress is producing a result that it could not command directly, an activity that the Supreme Court has specifically forbidden.[288] Like the constitutional violations in *Perry* and *Speiser*, the Simpson Amendment and the proposed Istook Amendment are likewise unconstitutional.[289]

Both the Simpson Amendment and the proposed Istook Amendment are similar to the federal statute struck down by the United States Supreme Court in *FCC v. League of Women Voters of California*.[290] The statute in *League of Women Voters*, like the Simpson Amendment and the proposed Istook Amendment, prohibited recipients of federal funds from engaging in First Amendment activity, in this case editorializing.[291] Like the Court in *League of Women Voters*, a court analyzing either the Simpson or Istook Amendments may weigh the constitutionality of the Amendments according to a balancing test.[292] According to the legislative histories of both the Simpson and Istook Amendments, Congress felt that the governmental interest implicated by the legislation was to prevent the use of taxpayer money in ways with which taxpayers may disagree.[293] The Supreme

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[284] *See Perry*, 408 U.S. at 597–98; *Speiser*, 357 U.S. at 519.

[285] Section 501(c)(3) organizations receive a larger subsidy from the government as they are able to avoid paying taxes on income and to have donors deduct contributions to the organizations. *See supra* note 53 and accompanying text.

[286] *See Perry*, 408 U.S. at 597.

[287] *Id.*; *Speiser*, 357 U.S. at 518.

[288] *Perry*, 408 U.S. at 597.

[289] *Id.*; *Speiser*, 357 U.S. at 518–19.

[290] *See* 468 U.S. 364, 392–93 (1984).

[291] *See id.* at 370 n.7.

[292] *Id.* at 383.

[293] *See supra* note 194. Advocates of the Simpson and Istook Amendments may try to argue that an additional governmental interest that the Amendments were directed at was to prevent

Court has specifically rejected this as a sufficient governmental interest:

> [V]irtually every congressional appropriation will to some extent involve a use of public money as to which some taxpayers may object. Nevertheless, this does not mean that those taxpayers have a constitutionally protected right to enjoin such expenditures. Nor can this interest be invoked to justify a congressional decision to suppress speech.[294]

Like the statute in *League of Women Voters*, the Simpson and Istook Amendments are aimed at delegating funds only to those organizations whose political agenda is palatable to the majority party in control of Congress.[295] A neutral court, however, will most likely find, like the Supreme Court did in *League of Women Voters*, that this governmental interest is not sufficient to justify a restriction on First Amendment activity.[296]

### B. *The Simpson and Istook Amendments Are Not Governed by the Subsidy Line of Cases*

Proponents of the Simpson and Istook Amendments characterize the Amendments as constitutional under the Supreme Court's decision in *Regan v. Taxation With Representation*.[297] Proponents of the Simpson Amendment would most likely argue that Congress was simply making a discretionary decision that it would not subsidize the lobbying activities of § 501(c)(4) nonprofits to the extent that it subsidizes other activities.[298] Reliance on *Regan*, however, is faulty. The Court in *Regan* was adjudicating whether Congress could, in its discretion, decide whether tax deductible contributions should be used

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organizations from having undue influence on government through the federal funds that they received. This argument is faulty. It may have been more on point if Congress had included groups like defense contractors within the reach of these Amendments. *See supra* note 241 and accompanying text.

[294] *League of Women Voters*, 468 U.S. at 385 n.16.

[295] *Id.* at 370 n.7. Both Amendments seem non-discriminatory because of their effect on all § 501(c)(3) and § 501(c)(4) organizations. In reality, many "non-liberal" organizations do not depend on federal funds to the extent that the more liberal groups do. Even if currently receiving some federal funds, these groups are more likely to be able to survive without the funds through corporate and individual fund raising efforts. The Simpson and Istook Amendments will not affect the voice of these groups but will instead make them more pronounced since liberal groups who depend on federal funds may no longer be able to counter their opinions.

[296] *See id.* at 385 n.16.

[297] 461 U.S. 540, 540 (1983). Analysis of the Amendments, opponents would most likely argue, is thus under the "subsidy" line of cases. *Id.*; Cammarano v. United States, 358 U.S. 498, 498 (1959).

[298] *Regan*, 461 U.S. at 544.

to subsidize lobbying activities of § 501(c)(3) nonprofit organizations.[299] The Court thus analyzed the amount of discretion allowed to Congress when dealing with federal subsidies used to pay for lobbying activities.[300] As applied to the Simpson Amendment and the proposed Istook Amendment, this reasoning is faulty because federal funds do not subsidize lobbying activities.[301] All recipients of federal funds are precluded from using any federal funds to lobby.[302] Federal funds do, however, subsidize the non-lobbying activities of the organization. Relying on *Regan* is misplaced because the government cannot use its discretion to condition subsidies for non-lobbying activity on the amount of lobbying activity that the organization is engaging in with its private funds.[303]

In addition, the Court's opinion in *Regan* relied on the fact that although organizations that engaged in substantial lobbying were precluded from § 501(c)(3) status, these organizations were able to organize under § 501(c)(4) with unlimited ability to lobby.[304] The Simpson Amendment closes the § 501(c)(4) avenue for nonprofit organizations noted in *Regan*.[305] Under a strict reading of the Simpson Amendment, organizations that receive federal funds and want to continue lobbying must organize under § 501(c)(3) and limit their lobbying activities according to the tests in the tax code.[306] Similarly, if Congress passes the Istook Amendment, § 501(c)(3) organizations who wish to escape the new limitations on political advocacy will be foreclosed from re-organizing into § 501(c)(4) organizations to escape lobbying restrictions by the Simpson Amendment.[307]

The *Regan* decision also makes note of the distinction between the use of private and public funds and the limits on the government's ability to regulate the use of an organization's private funds.[308] Neither the Simpson Amendment nor the proposed Istook Amendment make distinctions between an organization's use of private and public funds for lobbying.[309] Under both Amendments, if a § 501(c)(3) or a § 501(c)(4) nonprofit receives federal funds, all of its funds, both pri-

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[299] *Id.* at 543–44.

[300] *See id.*

[301] *See supra* notes 66–67 and accompanying text.

[302] *Id.*

[303] *Id.*

[304] *Regan*, 461 U.S. at 544.

[305] *See id.*; *supra* Section III.A.

[306] *See supra* Section III.A; notes 55–61 and accompanying text.

[307] *See supra* Section III.A.

[308] *See Regan*, 540 U.S. at 545, 553.

[309] *See supra* text accompanying note 191; notes 212–14 and accompanying text.

vate and public are tainted, unable to be used to lobby the government.

The Supreme Court has noted its disapproval of legislation that precludes recipients of federal benefits from using wholly private money.[310] The Court in *League of Women Voters* specifically stated that it was troubled that the radio station was "barred from using even wholly private funds to finance its editorial activity."[311] Like the statute in *League of Women Voters*, the Simpson Amendment and the proposed Istook Amendment preclude nonprofit organizations from using either public or private funds to engage in First Amendment activity.[312] In addition, the Court's decision in *Rust v. Sullivan* reiterated the Court's disapproval of restrictions on privately funded activity.[313] The Court in *Rust* found the statute conditioning federal funds on a ban on abortion-related activity constitutional as long as grantees were not precluded from engaging in abortion-related activities with private funds, in a separate capacity.[314]

The legislative history of the Simpson Amendment cites the possibility for a dual structure similar to the hypothetical structure in the Court's decision in *Rust*.[315] This dual structure would allow recipients to set up two § 501(c)(4) organizations, one for federally funded non-lobbying activity and the other for privately funded lobbying activity.[316] This change in structure would allow recipients of federal funds to engage in lobbying activities as long as they were separate and distinct from the organization's non-lobbying arm, similar to the Court's hypothetical structure in *Rust*.[317] If Congress were to enact the Istook Amendment, recipients of federal funds within the ambit of the Amendment could also attempt to utilize the segregation reasoning in *Rust*.[318] Under this reasoning, organizations could segregate their lobbying activities into a wholly separate entity, whether § 501(c)(3) or § 501(c)(4).[319]

The requirement for segregation set out in *Rust*, however, may put insurmountable roadblocks in the way of the ability of § 501(c)(3) and

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[310] *See* FCC v. League of Women Voters of Cal., 468 U.S. 364, 400 (1984).
[311] *Id.*
[312] *Supra* text accompanying note 191; notes 212–14 and accompanying text.
[313] Rust v. Sullivan, 500 U.S. 173, 197–98 (1991).
[314] *See id.*
[315] *See id; supra* notes 204–05.
[316] *Supra* notes 204–05.
[317] *See* 500 U.S. at 197–98.
[318] *Id.*
[319] *See id.*

§ 501(c)(4) organizations to exercise their free speech rights.[320] The situation that these organizations face by having to segregate their activities into two different organizations is similar to that in *Federal Election Commission v. Massachusetts Citizens for Life* where a statute that served to discourage free speech in this manner was an "infringement on First Amendment activities."[321] Similarly, the Simpson Amendment and the proposed Istook Amendment, while not foreclosing all avenues for the organization to use its private funds,[322] create a situation that serves to discourage the exercise of free speech.[323]

The number of roadblocks that the segregation requirement would put in the way of an organization engaging in free speech is somewhat undetermined. The *Rust* opinion does not say to what extent an organization must segregate its activities in order to satisfy the Court.[324] For example, the opinion leaves open questions such as whether the lobbying arm of the organization can share employees with the non-lobbying arm.[325] In addition, both the Simpson Amendment and the proposed Istook Amendment would result in increased administrative costs, a significant roadblock for all organizations. Not only would § 501(c)(4) organizations have to file extensive paperwork as a condition of § 501(c)(4) status but they would also have to file additional paperwork to comply with the Simpson Amendment.[326] If the organization were to utilize the dual structure, the amount of paperwork would double.[327] If Congress were to pass the Istook Amendment, § 501(c)(3) organizations that also receive federal grants would also be subject to increased administrative costs. If § 501(c)(3) organizations desired to keep their federal funds, they would have to carefully police all of their lobbying activity in order to comply both with the § 501(c)(3) limitations imposed by the tax code and with the potential new limitations imposed by the Istook Amendment.[328] In

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[320] *See id.*

[321] *See* Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 254–55 (1986).

[322] Under the Simpson Amendment, organizations can still go to a § 501(c)(3) organization or create a dually structured organization.

[323] *Citizens for Life*, 479 U.S. at 254–55.

[324] *See Rust*, 500 U.S. at 173.

[325] *See id.* A requirement such as this would put significant roadblocks in the way of smaller organizations that may only have a few employees.

[326] *See supra* Section III.A.

[327] *Id.*

[328] *See supra* notes 55–61 and accompanying text.

addition, the proposed Istook Amendment would subject organizations to lawsuits by the government and individuals for any violations of the Amendment.[329]

When faced with the number and complexity of the limitations that organizations must comply with under already existing tax code regulations and those imposed by either the Simpson Amendment or the proposed Istook Amendment, organizations may very well decide to forego lobbying activity in order to reduce administrative costs or reduce their risk of loss of the federal funds. Although both the Simpson Amendment and the proposed Istook Amendment allow for avenues by which organizations can continue very limited amounts of lobbying, these limitations effectively frustrate the exercise of First Amendment rights.[330]

## V. Conclusion

This Comment has addressed the serious constitutional issues that arise when the government attaches conditional strings to federal benefits. This Comment has recognized that the government has some ability to attach conditions to benefits. The point that it illustrates is that the government cannot use its vast powers to attach strings to benefits that frustrate the ability of the recipient to engage in constitutionally protected activity. Lobbying is a fundamental and important part of the political agenda of many nonprofit organizations, particularly environmental groups. Without the ability to lobby effectively, the voice of groups who strive to preserve and strengthen environmental laws in this country will be diluted, if not lost entirely. This outcome strengthens the voice of industrial lobbyists and may result in the scale-back of current environmental laws and a moratorium on new laws aimed at preserving the environment.

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[329] *See supra* notes 232–33 and accompanying text.

[330] *See* Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 253–54 (1986).